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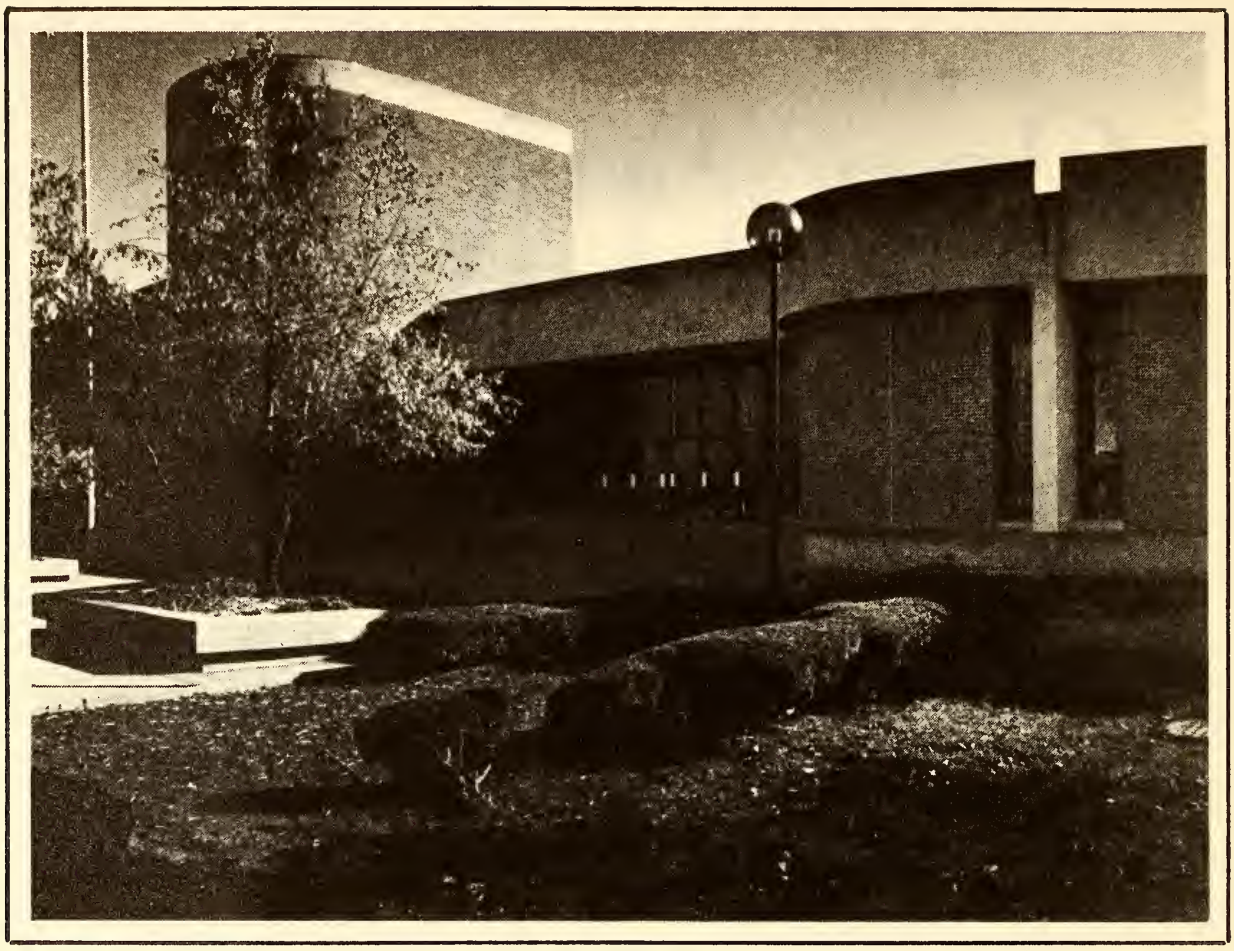

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ARTICLES

Qualified Immunity: A User's Manual

KAREN M. BLUM*

INTRODUCTION

The qualified immunity defense remains one of the toughest issues for both bench and bar to negotiate as they work their way through the maze of legal doctrines that now envelops litigation under 42 U.S.C. § 1983.[1] The basic formulation of the qualified immunity standard, as it is currently applied, is set out in *Harlow v. Fitzgerald*[2] and *Anderson v. Creighton*.[3] An official performing discretionary functions has qualified

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* Professor of Law, Suffolk University Law School. B.A., 1968, Wells College; J.D., 1974, Suffolk University; LL.M., 1976, Harvard University. The author wishes to express her gratitude to Michael Avery, with whom she spent an exciting sabbatical in the fall of 1991 and from whom she learned a great deal about the "real world" of section 1983. I also want to convey my appreciation to the Federal Judicial Center for the opportunities it has afforded me to teach and to learn from extremely dedicated and hard-working federal judges, magistrate judges and appellate staff attorneys. Finally, my thanks to Dean Paul Sugarman and Suffolk University Law School for their financial and moral support.

1. 42 U.S.C. § 1983 (1982). The statute provides in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.
2. 457 U.S. 800 (1982).
3. 483 U.S. 635 (1987).

immunity from damages liability[4] under § 1983, so long as his or her conduct conforms to what a reasonable official would have believed lawful in light of clearly established law and the information possessed by the particular official at the time of the challenged conduct.[5]

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4. Qualified immunity is not a defense to a claim for injunctive relief. *See, e.g.*, Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991).

A government official may invoke one of two types of immunity from personal liability for damages: absolute or qualified immunity. The Supreme Court has adopted a "functional" approach to immunity, so that whether an official is entitled to absolute or qualified immunity will depend on the function performed by that official in a particular context. Forrester v. White, 484 U.S. 219, 224 (1988). Most government officials are entitled only to qualified immunity. Officials performing judicial, legislative, or prosecutorial functions have been afforded absolute immunity. *See, e.g.*, Mireles v. Waco, 112 S. Ct. 286, 289 (1991) (holding that absolute judicial immunity exists when conduct is in excess of jurisdiction rather than in absence of jurisdiction); Burns v. Reed, 111 S. Ct. 1934, 1940-45 (1991) (holding that prosecutor is absolutely immune for functions performed in probable cause hearing, but only qualified immunity attached to function of giving legal advice to police); Forrester v. White, 484 U.S. 219, 228-29 (1988) (holding that judge has absolute immunity only when acting in judicial, as opposed to adminstrative, capacity); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979) (finding absolute immunity for members of regional land planning agency acting in legislative capacity); Stump v. Sparkman, 435 U.S. 349 (1978) (finding absolute immunity for judge acting within jurisdiction); Imbler v. Pachtman, 424 U.S. 409, 424-26 (1976) (finding absolute immunity for prosecutors performing prosecutorial acts); Tenney v. Brandhove, 341 U.S. 367 (1951) (absolute immunity for members of Congress).

See also Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992) (en banc) (affording absolute immunity to members of state medical licensing board sued in their individual capacities with respect to suspension or revocation of doctor's license); Buckley v. Fitzsimmons, 952 F.2d 965, 967 (7th Cir. 1992) ("[U]nless the act of gathering and evaluating the evidence independently violates someone's rights . . . both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court." The court rejected the defendant's argument that statements made by the prosecutor during a press conference violated his rights because publicity deprived him of a fair bail hearing and trial, and because any injury apart from defamation, which is not actionable under the Constitution, depended on judicial action for which there is immunity.), *cert. granted*, 113 S. Ct. 53 (1992); Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (9th Cir. 1991) (deciding that a court reporter and her employer enjoyed absolute immunity when the delay in producing transcripts held up the defendant's appeal for four years and only a partial transcript was produced because of loss of tapes), *cert. granted*, 113 S. Ct. 320 (1992).

The Supreme Court has recently held that private persons, named as defendants in § 1983 suits challenging their use of state replevin, garnishment, or attachment statutes later held unconstitutional cannot invoke the qualified immunity available to government officials in such suits. Wyatt v. Cole, 112 S. Ct. 1827 (1992).

5. In *Harlow*, the Supreme Court abandoned the subjective prong of qualified immunity that had been established in Wood v. Strickland, 420 U.S. 308, 322 (1975), which made the state of mind of the official relevant to the immunity inquiry and made disposition of the immunity defense difficult at the summary judgment stage. *Harlow*, 457 U.S. at 815-18. Under *Harlow*, the inquiry became objective: whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have

The legal literature is filled with articles addressing the policy questions underlying the availability and scope of the defense.[6] This author would tend to agree with those who have concluded that the costs of the defense may outweigh the benefits to such a degree that the defense should be abandoned as an inefficient allocation of resources.[7] The purpose of this

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known." *Id.* at 818.

In *Anderson v. Creighton*, a case involving the question of whether probable cause and exigent circumstances existed to support a warrantless search, the Supreme Court made the facts surrounding the conduct of the officer(s) in the particular situation relevant to the qualified immunity issue. The question became "the objective (albeit fact-specific)" one of "whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and information the searching officers possessed." 483 U.S. at 641.

6. *See, e.g.*, Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369 (1989); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597 (1989); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 (1989); Kathryn R. Urbanya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61 (1989); Henk J. Brands, Note, *Qualified Immunity And The Allocation of Decision-Making Functions Between Judge and Jury*, 90 COLUM. L. REV. 1045 (1990); Mary A. McKenzie, Note, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV. 673 (1991).

7. In K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990), Judge Posner made the following comments in dicta:

> The defense of public officer immunity in civil rights damage suits is thought in some quarters a second-best solution to the problems created by imposing tort liability on public officers. The defense is not found in the civil rights statutes themselves, but is a judicial addition to the statutes . . . a creative graft, and viable therefore only if it serves a social purpose. . . .
>
> An alternative that is sometimes discussed would be to abolish public officer immunity but couple abolition with the imposition of respondeat superior liability on the public officer's employer. Although rejected in *Monell*, . . . it would be a step no bolder than the creation, and in recent years amplification, of public officer immunity itself. The officer would be liable but so would be his employer; as a practical matter the officer would be even farther off the hook than under existing law plus the practice of indemnity; but this end would be accomplished without denying a recovery to the plaintiff and thereby diluting the deterrent effect of the civil rights laws. Only as a theoretical matter would the employee be worse off because an employer held liable for an employee's torts under the doctrine of respondeat superior is entitled to indemnity from the employee. Practice is more important than theory.

Id. at 850-51.

This author long ago advocated the adoption of *respondeat superior* liability in § 1983 suits. *See* Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 413 n.15 (1978). *See also* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law*

Article, however, is not to debate the validity of the defense as a historical matter nor the soundness of the defense or its scope as a matter of policy. The Article is offered as a "user's manual" to qualified immunity—a map for lawyers and judges who must cross this road frequently in the course of their daily travels.

The Article first outlines the new structure of analysis for qualified immunity as established in *Siegert v. Gilley*[8] and examines some post-*Siegert* case law for the purpose of identifying courts following and not following the mandated *Siegert* analysis. In the context of discussing *Siegert*, attention is devoted to the "heightened pleading standard," its relationship to the issue of qualified immunity, and its role as a common source of confusion between elements of the substantive constitutional claim being asserted and elements of the defense of qualified immunity. Part II addresses how courts decide whether the right allegedly violated was clearly established at the time of the challenged conduct and focuses particularly on how the right is framed and what is viewed as sufficient precedent to establish the right. Part III explores the relevance of factual disputes to the pretrial disposition of the qualified immunity issue and the role of the judge and jury in the process. Part IV examines the availability of interlocutory appeal and the effect on appealability, if any, of a denial of qualified immunity based on the existence of material issues of fact in dispute. Part V deals briefly with the particular problem of the applicability of qualified immunity in Fourth Amendment excessive force cases. In concluding, the Article summarizes and organizes the qualified immunity analysis into a framework which should be helpful to those who have to wind their way through the network as it operates today.

I. Structure of Analysis for Qualified Immunity

In *Siegert*, the plaintiff, a clinical psychologist, brought a *Bivens*[9] action against his supervisor, claiming impairment of future employment prospects due to a defamatory letter of reference sent by the supervisor.[10]

Enforcers' Misconduct, 87 Yale L.J. 447, 455-58 (1978) (arguing § 1983 should be amended to make local government units the proper defendants) ("[T]he good faith defense, imported into [§] 1983 through unwarranted borrowing from the common law, should be abolished."); Rudovsky, *supra* note 6, at 31 n.43 (collecting works of commentators advocating broadened governmental liability in lieu of individual liability).

8. 111 S. Ct. 1789 (1991).

9. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). When a plaintiff claims that her constitutional rights have been violated by an official acting under color of federal law, as opposed to state law, a *Bivens* action is the counterpart to a § 1983 action, with the right and the remedy being derived directly from the Constitution.

10. *Siegert*, 111 S. Ct. at 1791-92.

The Court of Appeals for the District of Columbia dismissed on the grounds plaintiff had not overcome respondent's claim of qualified immunity under that Circuit's "heightened pleading standard."[11]

The Supreme Court held that the claim failed at "an analytically earlier stage of the inquiry into qualified immunity."[12] The plaintiff did not state a claim for the violation of any rights secured by the Constitution.[13] Under *Paul v. Davis*,[14] there was no constitutional protection for one's interest in his reputation, even if facts sufficient to establish malice were pleaded.[15] Chief Justice Rehnquist set out the "analytical structure under which a claim of qualified immunity should be addressed."[16] The first inquiry is whether the plaintiff has alleged the violation of a constitutional right under the law as currently interpreted.[17] This question is purely legal, and it should be resolved before any discovery is allowed.[18]

Decisions from the courts of appeals after *Siegert* reflect an understanding by the majority of the circuits that the analytical framework has changed. In *Enlow v. Tishomingo County*,[19] for example, the court noted that although the typical approach to qualified immunity had been to address the issue of whether the right allegedly violated was clearly established at the time without first inquiring whether the right existed at all, *Siegert* instructs courts to first examine the merits of the plaintiff's underlying constitutional claim.[20] Likewise in *Silver v. Franklin Township*,[21] the Court of Appeals for the Sixth Circuit admonished the district court for its failure to follow "the Supreme Court's directive in *Siegert* . . . that before reaching a qualified immunity issue a court should determine whether there has been a constitutional violation."[22] The district court, without determining whether the Board's action—even accepting the plaintiff's version of it—constituted a violation of the plaintiff's substantive due process rights, had concluded that members of a town Board of Zoning Appeals were immune from liability for a particular

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11. *Id.* at 1791-93.
12. *Id.* at 1791.
13. *Id.*
14. 424 U.S. 693 (1976).
15. *Siegert*, 111 S. Ct. at 1794.
16. *Id.* at 1793 (Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Souter).
17. *Id.*
18. *Id.*
19. 962 F.2d 501 (5th Cir. 1992).
20. *Id.* at 508 & n.19.
21. 966 F.2d 1031 (6th Cir. 1992).
22. *Id.* at 1035.

zoning decision.[23] The court of appeals held that the plaintiff stated no viable claim under the Constitution, and therefore, there was no need to reach the qualified immunity issue.[24]

Not all courts have digested *Siegert*'s message. For example, in *Wright v. Whiddon*,[25] the court takes an approach which is arguably inconsistent with the analysis required by *Siegert*. The parents of a pretrial detainee who was shot and killed during an attempted escape asserted the use of deadly force violated the detainee's Fourth Amendment rights. The court of appeals, with no mention of *Siegert*, did not decide the question of whether a pretrial detainee could assert an excessive force claim under the Fourth Amendment, but disposed of the case on qualified immunity grounds because "[t]he presence of such doubt about the existence and content of the constitutional right that [the defendant] is alleged to have violated is enough to entitle him to qualified immunity."[26] Rather than first deciding whether a pretrial detainee can state a claim for excessive

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23. *Id.* at 1036.

24. *Id.* In addition to *Enlow* and *Silver*, there are a number of post-*Siegert* decisions discussing and applying the new analytical framework established in that case. *See, e.g.*, Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992) (holding that when a complaint lacked facts sufficient to state a claim under § 1983, consideration of qualified immunity was premature); Maldonado v. Josey, 975 F.2d 727, 729 (10th Cir. 1992) ("As a threshold inquiry to qualified immunity, we first must determine whether [the plaintiff's] allegations, even if accepted as true, state a claim for violation of any rights secured under the United States Constitution."); Gordon v. Kidd, 971 F.2d 1087, 1093 (4th Cir. 1992) ("In analyzing the appeal of a denial of summary judgment on qualified immunity grounds, it is necessary first to identify the specific constitutional right allegedly violated."); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992) ("In *Siegert*, . . . the Supreme Court clarified the proper analysis for determining when a public official is entitiled to qualified immunity. First, [plaintiff] must assert a violation of its constitutional rights . . . . If no constitutional right has been asserted, [plaintiff's] complaint must be dismissed."); Mozzochi v. Borden, 959 F.2d 1174, 1179 (2d Cir. 1992) ("The first step is to determine whether the alleged conduct violates any constitutionally protected right at all. Conduct that does not violate any constitutional right certainly does not violate a constitutional right that was 'clearly established' at the time the conduct occurred."); Frohmader v. Wayne, 958 F.2d 1024, 1026 n.3 (10th Cir. 1992) ("Identification of the controlling constitutional principles and evaluation of the defendant's compliance therewith is, as a matter of analysis, the threshold question to be resolved when qualified immunity is asserted." (citing Spielman v. Hildebrand, 873 F.2d 1377, 1385 (10th Cir. 1989)); Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991) ("Deciding just when it became 'clearly established' that public officials could not do something that the Constitution allows them to do is silly."); Anderson v. Alpine City, 804 F. Supp. 269, 277 (D. Utah 1992) ("The court cannot determine whether qualified immunity applies until it first determines that there has been a violation of a constitutional right."); Pride v. Kansas Highway Patrol, 793 F. Supp. 279, 283 n.3 (D.Kan. 1992) ("Because the threshold requirement of establishing a constitutional violation is not met, the qualified immunity analysis necessarily terminates at this point.").

25. 951 F.2d 297 (11th Cir. 1992).

26. *Id.* at 300.

force under the Fourth Amendment, the court, ignoring *Siegert*, exclusively addressed whether the right was clearly established at the time.[27]

Siegert promises a resolution to a serious problem created by the traditional application of the immunity doctrine. Under the qualified immunity analysis commonly applied prior to *Siegert*,[28] courts could and would avoid deciding the issue of whether particular conduct violated constitutional law as presently interpreted, if, at the time of the challenged conduct, the right allegedly violated was not clearly established. This process frequently resulted in cases disposed of on qualified immunity grounds, with no resolution of the underlying constitutional claim.[29]

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27. *Id.* For other decisions that are arguably inconsistent with the Court's directive in *Siegert*, see Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir. 1992):

> We do not take the occasion here to decide whether an outside third party or co-employee could ever be liable for sexual harassment under § 1983 and the Equal Protection Clause. We resolve this case simply by noting that the Officers here were not violating clearly established law under the Equal Protection Clause when they acted as they did with respect to [plaintiffs].

See also Erickson v. United States, 976 F.2d 1299, 1301 (9th Cir. 1992):

> Fundamental principles of judicial restraint require federal courts to consider nonconstitutional grounds for decision prior to reaching constitutional questions. . . . Thus, a federal court should decide constitutional questions only when it is impossible to dispose of the case on some other ground. . . . Because the doctrine of qualified immunity disposes of this case, we do not reach the question whether the individual defendants violated [plaintiff's] constitutional rights.

28. Some courts, even prior to *Siegert*, were doing the analysis that *Siegert* mandates. *See, e.g.*, Brown v. Grabowski, 922 F.2d 1097, 1110 (3d Cir. 1990) (holding that the inquiry into whether the asserted constitutional right to assistance in gaining access to the civil courts was clearly established at the time, would seem to encompass an inquiry into whether the right was recognized at all), *cert. denied*, 111 S. Ct. 2827 (1991); Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) ("Once a defendant raises the defense of qualified immunity, plaintiffs must come forward with facts or allegations to show both that the defendants alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." If the plaintiff cannot produce enough evidence to show that the challenged conduct violated law "as presently interpreted," then it is unnecessary to consider whether the law was clearly established at the time.).

29. *See, e.g.*, Long v. Norris, 929 F.2d 1111, 1115 (6th Cir. 1991):

> We need not define in this case precisely what level of individualized suspicion is required in the context of prison visitor searches. The question before the court is not whether the proper standard should be reasonable suspicion . . . or probable cause, but whether a constitutional right to be free from strip and body cavity search absent probable cause was clearly established at the time of the searches.

See also Rudovsky, *supra* note 6, at 53-55 (discussing cases in which courts have addressed the qualified immunity issue but left the constitutional issue undecided).

Because qualified immunity is not available as a defense to claims for injunctive relief, *see* note 4 *supra*, and is not available to local governments sued under § 1983, Owen v. City of Independence, 445 U.S. 622 (1980), a new constitutional doctrine could be announced in cases including these kinds of claims. *But see* Rudovsky, *supra* note 6, at 55-56 (discussing

Siegert clearly changes the approach most courts were taking in qualified immunity cases and mandates resolution of the constitutional question. To the extent that the merits of plaintiff's constitutional claim are in issue at the threshold stage of the qualified immunity analysis, *Siegert* calls into question language in *Mitchell v. Forsyth*,[30] where the Supreme Court stated that in reviewing the denial of qualified immunity on interlocutory appeal, an appellate court need not determine "whether the plaintiff's allegations actually state a claim."[31] In the wake of *Siegert*, attention to the adequacy of plaintiff's underlying claim is required as an initial step in the qualified immunity inquiry.[32]

Although Rule 8 of the Federal Rules of Civil Procedure has been construed to require only "notice pleading,"[33] a number of courts impose a "heightened pleading requirement" in § 1983 cases. The higher standard is most often applied when one or more of the following factors exists: (1) individual defendants have a potential immunity defense,[34] (2) state

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the problems with reliance on these kinds of claims for development of constitutional doctrine).

30. 472 U.S. 511 (1985). The Court in *Forsyth* held that a pretrial denial of qualified immunity is immediately appealable under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). For an interlocutory order to be appealable under *Cohen*, the order must conclusively determine the matter in question, address an issue separate from and collateral to the merits of the case and be effectively unreviewable after a final judgment in the case. *Forsyth*, 472 U.S. at 525-527.

31. *Forsyth*, 472 U.S. at 528.

32. Note that to the extent that *Siegert* requires a court to focus on the merits of the underlying claim, the rationale of allowing interlocutory appeals under the collateral order doctrine for orders denying qualified immunity might be strained.

33. Conley v. Gibson, 355 U.S. 41, 47 (1957). Rule 8(a)(2) provides that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (1987).

34. Although the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Gomez v. Toledo, 446 U.S. 635 (1980), has indicated that qualified immunity is an affirmative defense, a number of courts require plaintiffs to plead enough facts about the violation of a "clearly established" right so as to defeat a defendant's anticipated claim of qualified immunity. *See, e.g.*, Sawyer v. County of Creek, 908 F.2d 663, 665-66 (10th Cir. 1990); Elliot v. Perez, 751 F.2d 1472, 1481-82 (5th Cir. 1985).

See also Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992):

> [W]e want to use this opportunity to repeat that, 'in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts, have tightened the application of Rule 8 to § 1983 cases.' . . . In pleading a section 1983 action, some factual detail is necessary, especially if we are to be able to see that the allegedly violated right was clearly established when the allegedly wrongful acts occurred. We also stress that this heightened Rule 8 requirement—as the law of the circuit—must be applied by the district courts. (citation omitted);

Jackson v. City of Beaumont Police Dept., 958 F.2d 616, 620 (5th Cir. 1992) ("[T]his circuit requires that § 1983 plaintiffs meet heightened pleading requirements in cases . . .

of mind is an essential element of the underlying constitutional claim,[35] (3) a conspiracy is alleged,[36] or (4) local government liability is asserted.[37]

Although the majority in *Siegert* avoided the issue by disposing of the case on grounds the plaintiff stated no claim for relief, four Justices who did confront the question approved of the "heightened pleading standard" when the state of mind of the defendant is an essential component of the underlying constitutional claim.[38] However, the four

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in which an immunity defense can be raised. . . . We have consistently held that plaintiffs who invoke § 1983 must plead specific facts that, if proved, would overcome the individual defendant's immunity defense. . . ."); Hunter v. District of Columbia, 943 F.2d 69, 75-77 (D.C. Cir. 1991) ("[T]he heightened pleading requirement is not contingent upon the existence of a substantively distinct qualified immunity 'defense,' . . . . When a plaintiff claims that an officer used excessive force, the heightened pleading standard demands that he make 'nonconclusory allegations of evidence' sufficient to demonstrate that the force used actually was unreasonable.").

35. *See e.g.*, Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991). The plaintiff alleged that an officer violated his Fourth amendment rights by deliberately or recklessly misleading the magistrate to obtain search warrants. The court adopted a heightened pleading standard and allowed supporting allegations of motivation supportable by direct or circumstantial evidence. *Id.* at 1386-87; Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642 (10th Cir. 1988) ("Where the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated.").

36. *See, e.g.*, Crabtree v. Muchmore, 904 F.2d 1475, 1481 (10th Cir. 1990).

37. Plaintiffs attempting to impose liability upon a governmental unit pursuant to Monell v. Department of Social Servs., 436 U.S. 658 (1978), may be required to plead with particularity the existence of an official policy or custom which can be causally linked to the claimed underlying violation. *See, e.g.*, Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985).

See also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1057 (5th Cir. 1992), *cert. granted*, 112 S. Ct. 2989 (1992):

> Since Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985), [t]his circuit has, without fail, applied the heightened pleading requirement in cases in which the defendant-official can raise the immunity defense. . . . In Palmer v. City of San Antonio, 810 F.2d 514, 516-17 (5th Cir. 1987), a panel of this court extended the heightened pleading requirement into the municipal liability context.

In *Leatherman*, the Fifth Circuit upheld the dismissal of a complaint against a governmental entity for failure to plead with the requisite specificity. "While plaintiffs' complaint sets forth the facts concerning the police misconduct in great detail, it fails to state any facts with respect to the adequacy (or inadequacy) of the police training." 954 F.2d at 1058. In his specially concurring opinion, Judge Goldberg noted and discussed criticism of the heightened pleading requirement. He acknowledged the challenge encountered by plaintiffs who are required to provide specific facts and evidence of inadequate training prior to any discovery. Although "impressed by the wealth of authority plaintiffs cite in support of their position, I politely decline [plaintiffs'] invitation to reexamine the wisdom of this circuit's heightened pleading requirement." 954 F.2d at 1060-61 (Goldberg, J., concurring specially).

38. Siegert v. Gilley, 111 S. Ct. 1789, 1795 (1991) (Kennedy, J., concurring in the judgment); *id.* at 1800-01 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

Justices rejected the District of Columbia Circuit Court's "direct evidence" requirement and instead required nonconclusory allegations of subjective motivation supported by *either* direct *or* circumstantial evidence.[39] If this threshold is satisfied, then limited discovery may be allowed.

In *Elliott v. Thomas*,[40] Judge Easterbrook of the Court of Appeals for the Seventh Circuit noted the potential conflict between a "heightened pleading requirement" and the relatively minimal requirements set out by Federal Rules of Civil Procedure 8 and 9(b),[41] but resolved the apparent inconsistency by "deprecat[ing] the expression 'heightened pleading requirement' and speak[ing] instead of the minimum quantum of proof required to defeat the initial motion for summary judgment."[42] The plaintiff need not anticipate an immunity defense in her pleadings, but once the defense is raised in the answer and defendants move for summary judgment on qualified immunity grounds, the plaintiff must produce "'specific, nonconclusory factual allegations which establish [the necessary mental state] or face dismissal.'"[43]

Judge Easterbrook's portrayal of the "heightened pleading requirement" as the burden of proof which plaintiffs are required to meet under summary judgment principles,[44] a burden which is imposed *after*, rather than *at*, the initial pleading stage, makes sense and helps eliminate some of the confusion and tension permeating the relationship between the

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39. *Id.*

40. 937 F.2d 338 (7th Cir. 1991). *Elliott* was one of two cases consolidated for appellate purposes. The other was *Propst v. Weir*. Although much of the discussion that follows stems from issues that arose in the facts of *Propst*, the case will be referred to as *Elliott*.

41. Judge Easterbrook observed:

> Rule 8 establishes a system of notice rather than fact pleading; Rule 9(b) says that motive and intent may be pleaded generally; Rule 56 requires a court acting on a motion for summary judgment to draw all reasonable inferences favorable to the party opposing the motion. A 'heightened pleading requirement' in constitutional cases appears to conflict with all three rules.

Id. at 345. Judge Easterbrook's concerns are shared by Judge Patrick Higginbotham of the Fifth Circuit. *See* Elliot v. Perez, 751 F.2d 1472, 1482-83 (5th Cir. 1985) ("[N]otice pleading concepts rest on acceptance of the idea that one may sue now and discover later.").

42. *Elliott*, 937 F.2d at 345.

43. *Id.* at 344-45 (citing Justice Kennedy's opinion in *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring in the judgment)). Judge Easterbrook agreed with Justice Kennedy's view that circumstantial, as well as direct, evidence should be allowed to support the allegations. 937 F.2d at 345.

44. For a comprehensive treatment of the history, development, and application of summary judgment principles, see William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441 (1992). *See also* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Federal Rules of Civil Procedure governing pleading and the misnamed "heightened pleading requirement."

Although *Elliott* removes one source of confusion by making clear that plaintiffs do not have to "anticipate and plead around" the defense of qualified immunity,[45] the opinion appears to embrace another common source of confusion: the failure to distinguish between the substantive law controlling the question of liability when a claim requires proof of impermissible motive and the law applicable to the qualified immunity defense.[46]

One of the cases on appeal in *Elliott* involved a plaintiff who claimed she was transferred from one position to another as a means of punishing her for speech she believed was protected by the First Amendment. The defendants contended the transfer was motivated by legitimate concerns about disruption in working conditions.[47] The court noted the distinction between "the role of intent in defining the violation [and] the role of intent in ascertaining whether particular conduct was clearly unlawful at the time."[48] However, the court then blurred the distinction when concluding that, absent plaintiff's production of specific, nonconclusory factual allegations of subjective motivation, defendants would be entitled to judgment on qualified immunity grounds.[49]

In a case in which subjective motivation is an essential element of the plaintiff's substantive constitutional claim,[50] and the plaintiff fails to

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45. 937 F.2d at 345.

46. *See, e.g.,* Gainor v. Rogers, 973 F.2d 1379, 1390 (8th Cir. 1992) (Loken, J., dissenting):

> There is an issue lurking here that the Supreme Court has not yet addressed: if the plaintiff's constitutional claim is based upon the defendant's bad motives . . . and if the undisputed facts demonstrate that the defendant had an objectively reasonable basis for his conduct, can this alleged bad motive defeat summary judgment on qualified immunity grounds?

47. *Elliott*, 937 F.2d at 341, 343.

48. *Id.* at 344. *See also* Fiorenzo v. Nolan, 965 F.2d 348, 351-52 (7th Cir. 1992):

> In *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986), we held that *Harlow* requires the district court to conduct a two-part analysis when state of mind is at issue: '(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?' *Id.* at 70. Intent is relevant to the first inquiry. *Id.*

Accord, Auriemma v. Rice, 910 F.2d 1449, 1453 (7th Cir. 1990) (en banc) ("[W]hen intent is crucial to a party's claim . . . the court's consideration of intent is relevant to the determination of whether a constitutional violation exists but not in deciding if the constitutional standard was clearly established.").

49. *Elliott*, 937 F.2d at 344-45.

50. When the underlying constitutional claim has no state of mind requirement, it is clear that "bad faith" or improper motive is irrelevant to both the constitutional claim as well as the qualified immunity analysis. *See, e.g.,* Pritchett v. Alford, 973 F.2d 307,

meet his or her summary judgment burden of proof on the state of mind element, the result should be summary judgment for the defendant *on the merits*, not on qualified immunity grounds. Qualified immunity is irrelevant if the plaintiff cannot make out a constitutional violation.[51]

As a practical matter, in some cases the distinction will be insignificant; however, in many cases the distinction will make a difference. In cases in which both a governmental entity and an individual are sued, summary judgment for the individual defendant on qualified immunity grounds does not dispose of a claim brought under *Monell v. Department of Social Services*[52]

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315 (4th Cir. 1992) ("Illegal motive on the officer's part need not . . . be shown in order to defeat a qualified immunity defense to a Fourth Amendment claim which itself has no motive element."). *Compare* Corum v. University of N.C., 413 S.E.2d 276, 286 (N.C. 1992) ("Where the 'clearly established law' contains a subjective element . . . of motive or intent, it is a part of the summary judgment analysis.").

51. *See, e.g.*, Monroe v. Mazzarano, No. 90-C-5696, 1992 WL 199829, *13 (N.D. Ill.)(Rovner, J.) (unreported case):

> [T]he only purpose for which state of mind is considered in a qualified immunity analysis is to determine whether the defendant's alleged conduct, if true, would amount to a violation of the plaintiff's constitutional rights. . . . [T]his can only be the case where . . . intent to violate those rights is an element of the constitutional claim. . . .
>
> Subsequent decisions of the Seventh Circuit have made crystal clear that a defendant's 'improper motivation'. . . simply is not considered when a court is determining whether a defendant is protected by qualified immunity.

See also Sanchez v. Sanchez, 777 F. Supp. 906, 916 (D. N.M. 1991):

> With all due respect to the Circuit, this Court believes that . . . the Circuit has unnecessarily confused the nature of the qualified immunity analysis in cases of this sort. Like the First, Second, Third, Seventh, Eighth and Ninth Circuits, this Circuit should maintain a firm distinction between the plaintiff's burden of proof under the applicable substantive law and a defendant's entitlement to qualified immunity. When there is no proof to support a plaintiff's claim that a facially neutral act was infected by a defendant's constitutionally impermissible motive, the defendant is entitled to summary judgment because he has committed no act for which he can be held liable. In such situations the qualified immunity analysis is simply irrelevant.

52. 436 U.S. 658 (1978). In *Monell*, the Supreme Court overruled Monroe v. Pape, 365 U.S. 167 (1961), to the extent that *Monroe* had held that local government units could not be sued as "persons" under § 1983. *Monell* holds that local government units may be sued for damages, as well as declaratory and injunctive relief, whenever

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decisionmaking channels.

Id. at 690-91. *Monell* rejects government liability based on the doctrine of *respondeat superior*. Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. *Id.* at 691-92. *See generally* Karen M. Blum, Monell, DeShaney, and

against the governmental entity.[53] Furthermore, in such context, the plaintiff cannot take an interlocutory appeal from the court's *grant* of qualified immunity to the individual defendant, whereas a dismissal of the claim against the individual defendant on the merits would make the order a final judgment ripe for immediate appeal.[54]

II. When Is a Right "Clearly Established?"

Assuming a plaintiff is able to get by the first hurdle in the qualified immunity analysis by asserting the violation of a constitutional right under the law as presently construed, the next step requires the plaintiff to prove that the law regarding this right was clearly established at the time

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Zinermon: *Official Policy, Affirmative Duty, Established State Procedure, and Local Government Liability Under Section 1983*, 24 Creighton L. Rev. 1 (1990); Karen M. Blum, *From* Monroe *to* Monell: *Defining the Scope of Municipal Liability in Federal Courts*, 51 Temp. L.Q. 409 (1978).

In Owen v. City of Independence, 445 U.S. 622 (1980), the Court held that a government defendant has no qualified immunity from compensatory damages liability.

53. Given the law on qualified immunity, a government body could still be subject to liability under *Monell* for a constitutional violation when the individual officer is able to invoke qualified immunity as a defense to the § 1983 claim against her. *See, e.g.*, Dodd v. City of Norwich, 815 F.2d 862, 868 (2d Cir. 1987) (on rehearing), *cert. denied*, 484 U.S. 1007 (1987); Palmerin v. City of Riverside, 794 F.2d 1409, 1415 (9th Cir. 1986).

Courts sometimes confuse the consequences that flow from two very different determinations. If the court concludes that there is no underlying constitutional violation, then City of Los Angeles v. Heller, 475 U.S. 796 (1986), would dictate no liability on the part of any defendant. In *Heller*, the Supreme Court made clear that if there is no constitutional violation, there can be no liability, either on the part of the individual officer or the government body. The Court held that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* at 799.

If, however, the determination is that there is no liability on the part of the individual official because of the applicability of qualified immunity, it does not necessarily follow that there has been no constitutional violation and that the municipality cannot be liable. *See, e.g.*, Doe v. Sullivan County, Tenn., 956 F.2d 545, 554 (6th Cir. 1992) ("To read *Heller* as implying that a municipality is immune from liability regardless of whether the plaintiff suffered a constitutional deprivation simply because an officer was entitled to qualified immunity would . . . represent a misconstruction of its holding and rationale."); Munz v. Ryan, 752 F. Supp. 1537, 1551 (D. Kan. 1990) (finding no inconsistency in ruling that an official is entitled to qualified immunity but holding the municipality liable for any constitutional violations if caused by the final policymaker).

54. If the case were disposed of completely by dismissal of the particular constitutional claim on the merits, appeal would be available under 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts. If other claims were to proceed against other defendants or indeed, if other claims were to proceed against the same defendant, the order of dismissal could be appealed if certified under Fed. R. Civ. P. 54(b) (1987).

of the challenged conduct.[55] In *Anderson v. Creighton*,[56] the Supreme Court announced that for the right to be clearly established, "[t]he 'contours' of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [I]n light of pre-existing law the unlawfulness must be apparent."[57]

A number of courts have held that when the right in question is subject to a balancing test, the right will rarely be found clearly established.[58] In such cases, a plaintiff should strive to find case law that presents facts as closely analogous to her situation as possible.[59]

In most cases, the answer to the question of whether the right was clearly established will be a function of how narrowly the "contours" of the particular right are drawn when framing the inquiry. A few examples help illustrate how the framing of the question affects the outcome of

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55. Although qualified immunity is a defense which must be pleaded by the defendant, Gomez v. Toledo, 446 U.S. 635, 640 (1980), once the defendant raises qualified immunity, the burden of proof is on the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct. *See, e.g.*, Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991).

In Elder v. Holloway, 975 F.2d 1388, 1390 (9th Cir. 1992), the court affirmed the district court's grant of qualified immunity on the basis that the law was not clearly established at the time. The court held that:

> [i]n an adversary system where the plaintiff has the burden of showing that a specific right was clearly established in the law, if the court "gets it wrong" because the universe of cases proffered by the plaintiff in support of his claim that the right was clearly established turns out to be less than all of the potentially relevant legal facts, the plaintiff has invited whatever error occurs.

Id. at 1395.

56. 483 U.S. 635 (1987).

57. *Id.* at 640.

58. *See, e.g.*, Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity."); Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992) (relying on Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987) and Benson v. Allphin, 786 F.2d 268, 276 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986)) (concluding that a right subject to a balancing test can rarely be found 'clearly established' and finding that the right of familial integrity is such a right); Borucki v. Ryan, 827 F.2d 836, 848 (1st Cir. 1987) ("[W]hen the law requires a balancing of competing interests, . . . it may be unfair to charge an official with knowledge of the law in the absence of a previously decided case with clearly analogous facts."); Franz v. Lytle, 791 F. Supp. 827, 833 (D. Kan. 1992) ("The qualified nature of the right to familial integrity, requiring government officials to balance certain rights against others, makes it 'difficult, if not impossible, for officials to know when their conduct has violated "clearly established law." ' ") (citing *Frazier*, 957 F.2d at 931).

59. *See, e.g.*, Bartlett v. Fisher, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test.").

the qualified immunity analysis. In *Mozzochi v. Borden*,[60] the plaintiff sued officials claiming his prosecution under a criminal harassment statute was motivated by the impermissible purpose of desiring to chill his First Amendment rights.[61] The district court denied qualified immunity, framing the question "as whether 'a citizen possessed a clearly established constitutional right not to have his speech regulated because the state actor disagreed with its content.'"[62] As the court of appeals noted, when formulated at this level of generality, "the question answers itself."[63] *Anderson* requires a more fact-specific framing of the question. The court reformulated the question, incorporating the undisputed facts, as follows:

> [T]he qualified immunity question is whether, at the time the alleged acts took place, it was clearly established that an individual's constitutional rights were violated when a criminal prosecution, supported by probable cause, was initiated in an attempt to deter or silence the exercise by the criminal defendant of his right to free speech, but without the effect of actually deterring or silencing the individual.[64]

Not surprisingly, the court concluded that this right was not clearly established and the defendant was entitled to summary judgment on qualified immunity grounds.[65]

In *White v. Taylor*,[66] the plaintiff sued the Chief of Police and the City of Morton, Mississippi, claiming that he had been arrested without probable cause and detained for an unreasonable period without a determination of probable cause by a neutral magistrate.[67] The Chief of Police raised the qualified immunity defense both by way of a motion to dismiss and by motion for summary judgment. The defense was denied, the case tried to a jury, and a verdict rendered in favor of the defendants on all claims except the unreasonable detention claim against the Chief. The Chief then appealed.[68] The Court of Appeals for the Fifth Circuit

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60. 959 F.2d 1174 (2d Cir. 1992).

61. *Id.* at 1175.

62. *Id.* at 1178.

63. *Id.* (citing Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.")).

64. *Id.* at 1179.

65. *Id.* at 1180. The court actually concluded that the plaintiff's allegations stated no constitutional claim. *Id.* Thus, under Siegert v. Gilley, 111 S. Ct. 1789 (1991), the court should have ordered summary judgment on the merits.

66. 959 F.2d 539 (5th Cir. 1992).

67. *Id.* at 540.

68. *Id.* at 541.

concluded that the Chief of Police was entitled to qualified immunity as a matter of law.

> [W]hile we think the law was clearly established on May 29, 1987 that a warrantless misdemeanor arrestee had a right to a prompt determination of probable cause, . . . we hold the contours of that right were not sufficiently clear so that a reasonable law enforcement officer would have known that such a person, arrested late at night in a city without a night magistrate, could not be held overnight before taking the arrestee before a magistrate.[69]

Even within the same circuit, there is not always agreement on whether the contours of the right have been clearly established. In *Rich v. City of Mayfield Heights*,[70] the plaintiff sued individual police officers and the city after a pretrial detainee attempted suicide in the city jail. Included among the plaintiff's claims were allegations of the individual police officers' deliberate indifference to medical needs. The thrust of the plaintiff's complaint was that the detainee had not been cut down immediately when discovered hanging from his jail cell door. Instead, a dispatcher had been asked to call a fire department rescue squad for assistance. The district court denied qualified immunity on the claim of deliberate indifference to medical needs, and the officers pursued an interlocutory appeal.[71] The Court of Appeals for the Sixth Circuit found that although the pretrial detainee had a due process right to adequate medical care, this generalized right did not establish the more particularized "right of a pretrial detainee to be cut down by police officers when discovered hanging in a jail cell."[72]

About one month after *Rich* was decided, another panel of the Sixth Circuit rendered a split opinion in *Heflin v. Stewart County*.[73] *Heflin*, like *Rich*, was a suit brought by relatives of a pretrial detainee who was found hanging in his cell and was not cut down and did not receive cardio-pulmonary resuscitation (CPR) immediately. On facts which were somewhat more egregious than those in *Rich*,[74] the majority of the panel

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69. *Id.* at 546.
70. 955 F.2d 1092 (6th Cir. 1992).
71. *Id.* at 1093.
72. *Id.* at 1097-98.
73. 958 F.2d 709 (6th Cir. 1992).
74. The detainee in *Heflin* was found by a deputy sheriff. His hands and feet were tied together, a rag stuffed in his mouth, and his feet were touching the floor. Although offers were made to help the Deputy cut Heflin down, he ordered people out of the cell until an emergency medical team arrived. At that point, the Sheriff ordered pictures to be taken of the hanging body before it was cut down. *Id.* at 711-12.

held that "[t]he unlawfulness of doing nothing to attempt to save [the inmate's] life would have been apparent to a reasonable official in [defendants'] position" in light of pre-existing law.[75] Judge Kennedy, in dissent, cited *Rich* in support of her position that "the right of hanging victims displaying no vital signs to be immediately cut down and administered CPR by jail officials was [not] clearly established such that a reasonable official would have known of it."[76]

Apart from the question of how fact-specific a court may get in framing the right for the qualified immunity inquiry, there is also the issue of what law a court will consider in determining whether the particularized right is clearly established. Once the contours of the right have been defined, the most compelling proof of the right being clearly established will be recognition by the Supreme Court or by courts of appeals.[77] Where such controlling precedent is lacking, the question is to what extent courts will look to other circuits or state law to clearly establish a right.

The Sixth Circuit Court of Appeals has taken the hardest line on this issue. In *Marsh v. Arn*,[78] the court observed that "when there is no controlling precedent in the Sixth Circuit our court places little or no value on the opinions of other circuits in determining whether a right is clearly established."[79] For noncontrolling precedent to be the source of clearly established law in the Sixth Circuit, such decisions "must . . . point unmistakenly to the unconstitutionality of the [challenged] conduct."[80] For example, in *Daugherty v. Campbell*,[81] the court held that where the very conduct in question, a visual body cavity search of a prison visitor without reasonable suspicion, had been declared unconstitutional by every circuit addressing the issue in similar cases, the contours of the right were clearly established.[82]

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75. *Id.* at 717.

76. *Id.* at 719 (Kennedy, J., dissenting).

77. *See* Jensen v. Conrad, 747 F.2d 185, 194 (4th Cir. 1984) (looking to other courts of appeals to decide whether clearly established right existed), *cert. denied*, 470 U.S. 1052 (1985); Williamson v. City of Virginia Beach, 786 F. Supp. 1238, 1261-62 (E.D. Va. 1992).

78. 937 F.2d 1056 (6th Cir. 1991).

79. *Id.* at 1069. *See also* Hall v. Shipley, 932 F.2d 1147, 1150 (6th Cir. 1991); Eugene D. v. Karman, 889 F.2d 701, 706 (6th Cir. 1989), *cert. denied*, 496 U.S. 931 (1990).

80. Ohio Civil Serv. Employees Ass'n. v. Seiter, 858 F.2d 1171, 1177 (6th Cir. 1988) (The unconstitutionality of the conduct must "be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.").

81. 935 F.2d 780 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 939 (1992).

82. *Id.* at 787.

In *Johnson-El v. Schoemehl*,[83] a case of a pretrial detainee complaining of prison conditions, defendants made the argument that for the law to be clearly established, the particular conduct of the officials must have been held unlawful by that circuit or another court "with direct jurisdiction over the institution."[84] Although the Eighth Circuit agreed attention to cases within the circuit was important and the existence of precedent within the circuit would be relevant in determining whether and to what degree an official would be aware of the law, the court, nonetheless, rejected the per se rule offered by defendants.[85]

In the Seventh, Ninth, and Tenth Circuits, there is more flexibility in looking at noncontrolling precedent. The approach in these circuits is to look to "all available decisional law" in determining whether a right has been clearly established.[86] Although the Seventh and Tenth Circuits are willing to look to decisional law from other circuits, those decisions must make the unlawfulness of the official's conduct apparent.[87] The approach in the Ninth Circuit does not appear to require the non-controlling precedent to be as solidly developed.

In *Wood v. Ostrander*,[88] the Ninth Circuit held that a police officer owed a duty of care under the due process clause of the Fourteenth Amendment to a woman who was left abandoned on a highway after the officer arrested the driver of the car in which she was a passenger.[89]

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83. 878 F.2d 1043 (8th Cir. 1989).

84. *Id.* at 1049.

85. *Id.*

86. Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (quoting Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987)). *See* McDonald v. Haskins, 966 F.2d 292, 294 (7th Cir. 1992) (deciding that case on "all fours" is not required and allowing the plaintiff to rely on precedent from Third Circuit to demonstrate the law was clearly established); Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) ("The law may be found clearly established by reference to decisions from other circuits."); Henderson v. DeRobertis, 940 F.2d 1055, 1058-59 (7th Cir. 1991) (indicating that court should look to whatever decisional law is available to decide whether the right is clearly established). *See also* Courson v. McMillian, 939 F.2d 1479, 1498 n.32 (11th Cir. 1991):

> [C]learly established law in this circuit may include court decisions of the highest state court in the states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit.

87. *See, e.g.*, Patrick v. Miller, 953 F.2d 1240, 1249 (10th Cir. 1992) ("We consider the law to be 'clearly established' when it is well developed enough to inform the reasonable official that his conduct violates that law."); Henderson v. DeRobertis, 940 F.2d 1055, 1059 (7th Cir. 1991) ("[U]ntil a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been clearly established.").

88. 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).

89. *Id.* (indicating the standard is "deliberate indifference").

The woman was subsequently raped when trying to make her way home. In denying qualified immunity to the officer, the court relied on one analogous decision from the Seventh Circuit to conclude that the law was clearly established that the officer owed a duty of protection to the plaintiff in this situation.[90] In *Hilliard v. City and County of Denver*,[91] the Tenth Circuit, when confronted with essentially the same facts as in *Wood*, concluded that the existence of two opinions from other circuits was not sufficient to make the law clearly established in the Tenth Circuit that a duty to protect could be imposed outside of a custodial context.[92]

In the absence of controlling precedent from the Fourth Circuit Court of Appeals on the question of whether the law from other circuits may be considered in the "clearly established law" inquiry, the court in *Williamson v. City of Virginia Beach*[93] opted for the Eighth Circuit's approach, which rejected a per se rule that controlling precedent must exist for a claim to be valid. The court reasoned this approach "provide[d] the best balance of the competing interests at stake."[94] The court in *Williamson* viewed the Eighth Circuit's approach as a middle ground between the Sixth Circuit's insistence on Supreme Court or Sixth Circuit precedent and the Seventh and Ninth Circuits' willingness to consider "all available decisional law."[95]

This "common sense" approach does not allow officials to escape liability for unlawful conduct merely because the issue is one of first impression in that circuit.[96] Although a single decision from another federal or state court would presumably not suffice to put an official on notice as to the unlawfulness of her particular conduct, if other circuits have proscribed similar conduct to such an extent that a reasonable official would be aware of the law, then the law is clearly established.[97]

III. The Relevance of Factual Disputes to the Pretrial Disposition of Qualified Immunity: Role of the Judge Versus the Role of the Jury

In *Hunter v. Bryant*,[98] the Supreme Court admonished the Ninth Circuit Court of Appeals for what had become a common practice in

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90. *Id.* at 591-94. In the case relied upon, White v. City of Rochford, 592 F.2d 381, 383-85 (7th Cir. 1979), the court held that police had an affirmative duty to protect children left abandoned in a car on a busy freeway after police arrested the children's uncle for drag racing.

91. 930 F.2d 1516 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 656 (1991).

92. *Id.* at 1520.

93. 786 F. Supp. 1238 (E.D. Va. 1992).

94. *Id.* at 1262.

95. *Id.*

96. *Id.*

97. *Id.*

98. 112 S. Ct. 534 (1991) (per curiam). The Court reversed a judgment of the Ninth

that circuit: sending the qualified immunity issue to the jury.[99] In criticizing the approach taken by the Ninth Circuit, the Supreme Court made the following observations:

> The Court of Appeals' confusion is evident from its statement that '[w]hether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' 903 F.2d at 721. This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. . . . Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.[100]

The Court's message is clear.[101] In the absence of a genuine dispute about material facts, the question of whether a reasonable official could have believed her conduct to be lawful, in light of clearly established

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Circuit denying qualified immunity to federal agents who had arrested, without probable cause, someone they suspected of threatening the President's life. *Id.* at 537.

99. *Id.* at 536-37. For examples of this practice in the Ninth Circuit, see Barlow v. Ground, 943 F.2d 1132, 1139 (9th Cir. 1991) (holding that the question of whether reasonable official would know she is violating clearly established law was question for jury), *cert. denied*, 112 S. Ct. 2995 (1992); Floyd v. Laws, 929 F.2d 1390, 1394 (9th Cir. 1991) (holding that the trial court did not abuse its discretion by issuing jury instruction on qualified immunity); Ting v. U.S., 927 F.2d 1504, 1511 (9th Cir. 1991) (holding that the issue of qualified immunity could not be resolved as a matter of law in light of the factual conflict surrounding the shooting but was a jury question); Thorstead v. Kelly, 858 F.2d 571 (9th Cir. 1988) (holding that qualified immunity is a jury issue).

100. *Bryant*, 112 S. Ct. at 536-37.

101. Indeed, in the wake of *Bryant*, the Ninth Circuit has recognized that the Supreme Court has expressly rejected the approach previously taken in that Circuit. In Act Up!/ Portland v. Bagley, 971 F.2d 298 (9th Cir. 1992), the court noted:

> We interpret *Bryant* to hold that the question of whether a reasonable officer could have believed his conduct was proper under established law is a question of law that must be determined by the district court at the earliest possible point in the litigation. Where the facts underlying the qualified immunity determination are not in dispute, the determination should be made at summary judgement.

Id. at 301. *See also* Tachiquin v. Stowell, 789 F. Supp. 1512, 1520 (E.D. Cal. 1992) ("The question of whether a reasonable officer would have concluded that he had probable cause for an arrest under the circumstances is not ordinarily a question of fact for the jury.").

But see Coates v. Daugherty, 973 F.2d 290, 293 (4th Cir. 1992) ("As [defendants] apparently requested, the magistrate judge instructed the jury on the qualified immunity question. Neither party challenges the propriety of submitting this question to the jury nor the contents of the instruction; thus we do not consider these questions here.").

law and the circumstances surrounding the particular incident, is a question of law for the court to decide. Most federal courts, even prior to *Bryant*, had been treating the qualified immunity issue as a question of law when the facts were undisputed.[102] Thus, when no material facts relevant to the immunity defense are in dispute, the issue should be disposed of prior to trial.

If the complaint fails to satisfy the threshold requirement of stating a constitutional claim under *Siegert* or fails to allege facts from which the court could conclude that the right allegedly violated was clearly established at the time, then the qualified immunity issue can be disposed of on a motion to dismiss. Even if the plaintiff states a claim and the court decides the law was clearly established at the time, summary judgment would be appropriate if the court concludes that, given the undisputed facts, a reasonable official in defendant's position could have understood her conduct to be lawful.

The Supreme Court has emphasized the desirability of disposing of the immunity defense "long before trial,"[103] but such early disposition may be difficult or impossible when the facts are undeveloped or when material facts remain in dispute. The *Anderson* "fact-specific" inquiry makes the particular conduct of the official relevant in the qualified immunity analysis. When the law in a particular case is found to be clearly established, whether a reasonable official would have understood that her particular conduct was unlawful will depend upon the facts and information the officer possessed at the time of the conduct.

In some cases, factual disputes can be resolved prior to trial simply by allowing limited discovery to proceed on the facts crucial to the qualified immunity defense.[104] Rather than deny qualified immunity at this early stage (which inevitably leads to delay and more expense in the

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102. *See, e.g.*, Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir. 1990) (deciding qualified immunity is a legal, not a factual, issue which must be resolved in the first instance by the trial court); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (holding that application of qualified immunity is ultimately a question of law for the court to decide); Rakovich v. Wade, 850 F.2d 1180, 1204 (7th Cir. 1988) (en banc) (deciding that qualified immunity is question of law for district judge and not jury).

103. *Bryant*, 111 S. Ct. at 537. *See also* Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987) (noting that qualified immunity should be disposed of in "earliest possible stage of litigation"); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (stating that qualified immunity "is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.").

104. The Court in *Anderson* recognized that some limited discovery on the immunity issue might be required before a defendant's motion for summary judgment could be decided. The Court noted that "if the actions [defendant] claims he took are different from those [plaintiffs] allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before [defendant's] motion for summary judgment on qualified immunity grounds can be resolved." 483 U.S. at 646 n.6.

form of an interlocutory appeal),[105] the district court should simply defer its decision on qualified immunity until the material facts are sufficiently developed or clarified so that a decision can be made at the summary judgment stage.[106]

In many cases, however, material issues of fact will remain in dispute and will have to be decided by a jury. It is worth stressing at this point that not every factual dispute is a dispute about a *material* issue of fact.[107] A material fact is one which must be resolved to decide the qualified immunity issue. A material fact is a dispositive fact. Clearly, a material factual issue does not exist if the plaintiff has failed to allege the violation of a constitutional right sufficient to survive the threshold requirement of *Siegert*.[108] Likewise, if a plaintiff's allegations, though disputed, are taken as true but, even on plaintiff's version of the facts, the defendant is entitled to qualified immunity as a matter of law, then the facts in dispute are not material and should not preclude summary judgment.[109]

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105. The problems of abuse, delay, and costs of interlocutory appeals based upon Mitchell v. Forsyth, 472 U.S. 511 (1985), have been the subject of discussion by some courts. *See e.g.*, Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Abel v. Miller, 904 F.2d 394, 396 (7th Cir. 1990); Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989). *See also* discussion *infra* Part IV.

106. *See, e.g.*, Act Up!/Portland v. Bagley, 971 F.2d 298, 301-02 (9th Cir. 1992) ("[T]he court is obliged to make every effort to develop the record to the extent necessary to make the determination at [the summary judgment] stage."); Mee v. Ortega, 967 F.2d 423, 430 & n.5 (10th Cir. 1992) (holding that factual disputes on the record required more development before a ruling on qualified immunity would be appropriate) ("If, at any point before trial, it appears to the district court that, as a matter of law, a reasonable parole officer could have believed [plaintiff's] continued incarceration lawful, summary judgment would be appropriate."); Workman v. Jordan, 958 F.2d 332, 336 (10th Cir. 1992) (holding that a court may allow limited discovery to develop or clarify facts needed to rule on qualified immunity claim and defer decision on qualified immunity); Howell v. Evans, 922 F.2d 712, 717-18 (11th Cir. 1991) (holding that when factual development is necessary, it can be achieved through discovery prior to trial, while still preserving opportunity to determine legal issues and to appeal before trial).

107. For an excellent discussion of how to determine "materiality" for summary judgment purposes, see Schwarzer et al., *supra* note 44, at 476.

108. *See, e.g.*, Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1566 n.1 (11th Cir. 1992) (agreeing with the district court's observation that factual disputes do not preclude summary judgment if plaintiff's complaint does not allege a violation of clearly established law); Bennett v. Parker, 898 F.2d 1530, 1532 (11th Cir. 1990) (holding that no material issues of fact are in dispute if the plaintiff's evidence fails to establish a constitutional violation).

109. *See, e.g.*, Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992) (holding that if, even when all facts as alleged by the nonmoving party are regarded as true, the moving party is still entitled to judgment as a matter of law, then factual disputes, however genuine, are not material, and their presence will not preclude summary judgment); Rozek v.

When historical facts[110] material to the issue of qualified immunity remain in dispute, summary judgment is inappropriate and a jury should decide those facts.[111] It is important to understand that a defendant does not lose his or her immunity simply because the qualified immunity issue cannot be disposed of on summary judgment.[112] If the qualified immunity issue is not resolved at the summary judgment stage, it is subject to disposition during trial, on a directed verdict motion, or even after trial on a motion for a judgment notwithstanding the verdict.[113] When factual issues remain for the jury, the best way to accomplish jury resolution of the facts while maintaining the court's control over the legal question of qualified immunity is to submit special interrogatories to the jury that will provide answers to the facts dispositive of the immunity defense.[114]

Topolnicki, 865 F.2d 1154, 1157 (10th Cir. 1989) (Issues of fact in dispute were not material "because even if they were resolved in [plaintiff's] favor, defendants . . . would still be entitled to qualified immunity for their handling of the investigation and prosecution."); Bailey v. Kenney, 791 F. Supp. 1511, 1519 (D. Kan. 1992) ("[A]ccepting plaintiff's version of the disputed facts, the court finds that reasonable officers could have believed the fugitive to have been at plaintiff's residence.").

110. A historical fact has been defined as "a thing done, an action performed, or an event or occurrence." Schwarzer et al., *supra* note 44, at 455.

111. *See, e.g.,* Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992):

> [T]he narrow threshold question whether a right allegedly violated was clearly established at the appropriate level of inquiry and at the time of the challenged conduct is always a matter of law for the court, hence is always capable of decision at the summary judgment stage. Whether the conduct allegedly violative of the right actually occurred or, if so, whether a reasonable officer would have known that that conduct would violate the right, however, may or may not be then subject to determination as a matter of law. If there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial.

112. *See, e.g.,* Buenrostro v. Collazo, 973 F.2d 39, 45 & n.8 (1st Cir. 1992):

> In this case, there seem to be additional facts, not yet fully developed and-or resolved, which could potentially inform the ultimate decision on qualified immunity. Hence, the defendants remain free to adduce additional proof at trial in an effort to demonstrate that they, or some among them, should be held harmless from damages by the doctrine of qualified immunity.

113. Adams v. St. Lucie County Sheriff's Department, 962 F.2d 1563, 1567 n.2 (11th Cir. 1992).

114. *See, e.g.,* Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992):

> The question of a defendant's qualified immunity is a question of law for the court, not a jury question. . . When the issue of qualified immunity remains unresolved at the time of trial, . . . the district court may properly use special interrogatories to allow the jury to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity.;

Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992):

> The law is now clear . . . that the defense of qualified immunity should be

Because of the emphasis placed on early establishment of qualified immunity, courts sometimes will ignore the principles normally applied in summary judgment practice. A comparison of two cases from the First and Fourth Circuits helps to illustrate the problem. In *Prokey v. Watkins*,[115] the plaintiff, an undercover police officer, alleged that defendants conspired to arrest her without probable cause. The facts in the case were "complex, intricate and in key areas contested."[116] In affirming the denial of defendants' motion for summary judgment on qualified immunity grounds, the Court of Appeals for the First Circuit articulated the very important distinction between the legal issue of qualified immunity and issues of disputed material facts. As the court stated:

> Whether . . . a reasonable policeman, on the basis of the information known to him, could have believed there was probable cause is a question of law, subject to resolution by the judge not the jury. . . . [I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder.[117]

An interesting case to contrast with *Prokey* is *Gooden v. Howard County*.[118] In *Gooden*, police officers responding to complaints of a

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decided by the court, and should not be submitted for decision by the jury. . . . If there are disputed issues of fact concerning qualified immunity that must be resolved by a full trial and which the district court determines that the jury should resolve, special interrogatories would be appropriate.;

Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 431 (1990):

> If there are unresolved factual issues which prevent an early disposition of [qualified immunity] defense, the jury should decide these issues on special interrogatories. The ultimate legal determination whether, on the facts found, a reasonable officer should have known he acted unlawfully is question of law better left for court to decide.

115. 942 F.2d 67 (1st Cir. 1991).

116. *Id.* at 73.

117. *Id. See also* Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992):

> The cases are legion in this and other circuits which establish that where there are genuine issues of material fact surrounding an arrestee's conduct it is impossible for the court to determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law.;

Enlow v. Tishomingo County, 962 F.2d 501, 510 (5th Cir. 1992) (When facts relied on to establish probable cause for arrest were in dispute, "[w]hether or not [defendant could] claim qualified immunity from [plaintiff's] Fourth Amendment claims remain[ed] a fact-disputed issue."); Frohmader v. Wayne, 958 F.2d 1024, 1028 (10th Cir. 1992) ("Courts may not resolve disputed questions of material fact in order to grant summary judgment . . . . [C]ourts, at the summary judgment level, are required to take the facts and reasonable inferences in the light most favorable to the party opposing summary judgment.").

118. 954 F.2d 960 (4th Cir. 1992) (en banc).

disturbance in an apartment complex took the plaintiff into protective custody for emergency psychiatric evaluation. The officers' conclusion that the plaintiff was the source of the disturbance was mistaken, and plaintiff brought suit under 42 U.S.C. § 1983 alleging, *inter alia*, a violation of her Fourth Amendment right to be free from seizure without probable cause of mental illness.[119] In a narrowly divided vote, the majority of the en banc court reversed a divided panel opinion[120] which had affirmed the district court's denial of qualified immunity to the police officers.[121]

The majority admitted that the underlying events giving rise to the officers' conduct on the evening in question were a matter of dispute; the plaintiff's version of what happened differed significantly from the defendants' account of the facts.[122] Furthermore, the majority acknowledged that there was evidence to suggest that a neighbor (other than the one who complained of noises coming from plaintiff's apartment) had informed the officers that the disturbance came from a couple arguing in the apartment below the complaining neighbor's, rather than from the plaintiff's apartment above.[123] There was also evidence that the officers had investigated a domestic dispute in the apartment below, took information and filed a report.

The majority minimized the importance of the factual disputes, taking the position that the "inevitable confusion" that commonly results when witnesses to an incident give different accounts as to what occurred "need not signify a difference of triable fact."[124] The relevant inquiry was stated

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119. The court acknowledged that the "general right to be free from seizure unless probable cause exists was clearly established in the mental health seizure context." *Id.* at 968.

120. Five of the 11 judges sitting en banc dissented from the majority opinion. 954 F.2d at 970 (Phillips, J., joined by Ervin, C.J., and Murnaghan, Sprouse, Butzner, JJ., dissenting).

121. Gooden v. Howard County, 917 F.2d 1355 (4th Cir. 1990).

122. *Gooden*, 954 F.2d 962-63. The facts are rather detailed, but the important disputes can be summarized. The defendants claimed that when they responded to a neighbor's second complaint about a loud disturbance coming from the apartment above her, they also thought they heard a loud scream coming from the plaintiff's apartment. When they proceeded to investigate, the plaintiff explained that she had been ironing and had burned herself. The plaintiff stated that she showed the defendants the hot iron, clothes on the ironing board, and a red mark on her arm. The officers claimed the iron was cold, no clothes were on the board, and they saw no evidence of a burn. After returning to the neighbor's downstairs apartment, the officers claimed to have heard another loud disturbance, including a male voice and a female voice, but never simultaneously. The officers concluded that plaintiff had a multiple personality and that she should be taken into custody to prevent her from harming herself. Plaintiff claimed that she informed the officers that she had been on the phone with her mother and a friend.

123. *Id.* at 964.

124. *Id.* at 965.

as: "What matters is whether the officers acted reasonably upon the reports available to them and whether they undertook an objectively reasonable investigation with respect to that information in light of the exigent circumstances they faced."[125]

Having so formulated the relevant question, the majority then apparently ignored the significance of factual disputes concerning which reports were available to the officers and what information they possessed at the time they took the plaintiff into custody. Instead, the court determined that there was "little dispute . . . about what the officers perceived," or the reasonableness of their perceptions.[126]

To conclude that the officers reasonably believed their conduct to be lawful, given the information they possessed at the time, the majority either dismissed as immaterial any dispute between the plaintiff and the officers about the historical facts of what occurred that evening, as well as the testimony of the neighbor, or the majority simply engaged in fact finding, deciding the historical facts and inferences to be drawn from them in favor of the officers.[127]

As the dissent in *Gooden* observes: "The importance of this case . . . lies in the classic problem it poses of accommodating qualified immunity doctrine's preference for pre-trial establishment of the defense, with summary judgment's insistence that, desirable as this may be, it cannot be done if genuine issues of fact material to the defense exist."[128]

Throughout its opinion, the majority repeatedly stressed the purpose and policy underlying qualified immunity, emphasizing each time the deference to be accorded officers who must make on-the-scene judgment calls in the performance of their duties.[129] *Gooden* is indeed a case in

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125. *Id.*

126. *Id.* The majority's determination that the officers' investigation uncovered no other possible sources for the noise, *id.* at 966, seems contradictory to its earlier acknowledgement that the officers had been informed of a domestic dispute, had investigated that incident and filed a report. *Id.* at 964.

127. As the dissent put it:

> [T]he majority essentially, though without ever saying so, shifts the burden to the plaintiff as nonmovant, either resolving conflicting inferences arising from conflicting versions of critical historical facts in favor of the defendants in an exercise of raw fact-finding, or simply sweeping aside as immaterial the existence of flat conflict in the evidence as forecast on certain critical issues.

Id. at 972 (Phillips, J., dissenting).

128. *Id.* at 974 (Phillips, J., dissenting).

129. The court first noted that an en banc hearing was granted "to underscore the reasonable latitude accorded law enforcement officers in the performance of their duties." *Id.* at 962. Shortly thereafter, the court stated that the doctrine of qualified immunity had been developed "with the express purpose of according police officers latitude in exercising what are inescapably discretionary functions replete with close judgment calls." *Id.* at 964.

which Seventh Amendment concerns about having juries decide disputed historical facts appear to be given less weight when balanced against the policy concerns underlying the judicially crafted qualified immunity defense. As the dissent suggests, the majority in *Gooden* "succumbed to what may be a rather widespread temptation to put another finger on the scale favoring pretrial establishment of immunity—by skewing summary judgment doctrine."[130]

IV. Availability of Interlocutory Appeal

In *Mitchell v. Forsyth*,[131] the Supreme Court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision'" under the

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Later in its opinion, the court declared, "the basic purpose of qualified immunity . . . is to spare individual officials the burdens and uncertainties of standing trial in those instances where their conduct would strike an objective observer as falling within the range of reasonable judgment." *Id.* at 965.

130. *Id.* at 974 (Phillips, J., dissenting). For what may be considered another example of this tendency to "tip the scales" in favor of a pretrial finding of qualified immunity, see Cross v. City of Des Moines, 965 F.2d 629, 632 (8th Cir. 1992) ("If a case involves a question of whether probable cause existed to support an officer's actions, the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed.") (citing *Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991)).

In a subsequent panel opinion of the Fourth Circuit, the court rejected defendant's reliance on *Gooden* to support his claim that the district court had erred in not granting his motion for summary judgment or a directed verdict on qualified immunity grounds. Rainey v. Conerly, 973 F.2d 321 (4th Cir. 1992). The court in *Rainey* observed:

> This case is distinguishable from this court's recent decision in *Gooden*. In *Gooden*, the *en banc* court addressed a similar situation in which the applicability of qualified immunity arguably depended on resolution of conflicting versions of the facts. The majority ultimately concluded that resolution of what actually happened was irrelevant to the qualified immunity claim, because the appropriate focus was on the perceptions of the officers. . . .
>
> Unlike *Gooden* where what actually happened did not need to be resolved by the trier of fact in order to reach a decision on the applicability of qualified immunity, in this case a determination of what actually happened is absolutely necessary to decide whether [defendant] could reasonably have believed that his actions were lawful. [Defendant] does not claim, as did the officers in *Gooden*, that he operated under a mistaken, but reasonable, perception of the facts. Instead, the crux of the dispute revolves entirely around the level of force utilized by [defendant] in removing [plaintiff] from the vestibule. . . . The determination of what actually happened depends exclusively on an assessment of the credibility of the respective witnesses. This assessment is a disputed issue of fact and, therefore, cannot be resolved on summary judgment or directed verdict.

Id. at 324.

131. 472 U.S. 511 (1985). Some courts refer to the case as *Mitchell*, others as *Forsyth*. For purposes of this Article, the case will be referred to in text as *Forsyth*, although quotations in footnotes may refer to either party name.

collateral order doctrine.[132] As noted earlier, language in *Forsyth* stating that an appellate court need not decide "whether the plaintiff's allegations actually state a claim"[133] appears inconsistent with the Court's directive in *Siegert* to address the constitutional issue as a threshold to the qualified immunity analysis.

Furthermore, since *Forsyth* was decided before *Anderson* made facts surrounding challenged conduct a relevant part of the immunity analysis, the issue that *Forsyth* envisions as reviewable on interlocutory appeal is "a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law."[134] *Anderson* adds another question of law which must be reviewed on interlocutory appeal: whether a reasonable official, given the information possessed by the defendant, would have known that her particular conduct violated a clearly established constitutional right.

There is general agreement that if the defense is "I didn't do it," an interlocutory appeal will not lie from a denial of summary judgment. Obviously, such a defense goes to the very merits of the case and has nothing to do with qualified immunity.[135]

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132. *Id.* at 530. See *supra* notes 30-32 and accompanying text for discussion of the collateral order doctrine.

133. *Id.* at 528.

134. *Id.* at 528 n.9.

135. *See, e.g.*, Kulwicki v. Dawson, 969 F.2d 1454, 1461 n.7 (3d Cir. 1992):

> We note that an appeal from a denial of immunity where factual issues remain is distinct from that where the defendant official denies taking the actions at issue. Unlike a claim of official immunity, the 'I didn't do it' defense relates strictly to the merits of the plaintiff's claim, and is therefore not immediately appealable.;

Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991):

> We note that some of [defendant] Britton's arguments on appeal take the form of a simple denial — an 'I didn't do it' defense. Immediate review of the district court's treatment of those issues is beyond the scope of *Mitchell's* exception, which exists to supply early review of the law 'clearly established' at the relevant time.;

Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991):

> It would extend *Mitchell* well beyond its rationale to accept an appeal containing nothing but a factual issue. . . . *Mitchell* did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly has held that *Mitchell* does not authorize an appeal to argue 'we didn't do it.' We join them.;

Johnson v. Estate of Laccheo, 935 F.2d 109 (6th Cir. 1991) (Guy, J., dissenting). Judge Guy criticized the majority for failing:

> to differentiate between a true qualified immunity motion, which when denied may be the subjection [sic] of an interlocutory appeal . . . and a regular summary judgment motion, which cannot be appealed when denied . . . . [I]f what the officer actually did, as opposed to the legal effect of what he did, is the basis

Some confusion and conflict exists about the availability of interlocutory appeal when qualified immunity has been denied because of material issues of fact in dispute. There is case law in both the Second and Eleventh Circuits holding that when a qualified immunity summary judgment motion is denied because of material issues of fact in dispute, no jurisdiction exists to hear an interlocutory appeal.[136] The majority of circuits, however, do exercise jurisdiction over such appeals.[137]

> of the dispute, . . . then we evaluate a district court's ruling as well as the right to interlocutory appeal by the same standards we use in reviewing any other type of summary judgment.

Id. at 113.

See also Unwin v. Campbell, 863 F.2d 124, 137-141 (1st Cir. 1988) (Breyer, J., dissenting). Judge Breyer presents a strong argument for the view that a defendant is not entitled to a 'qualified immunity' interlocutory appeal in respect to a pure fact-based 'evidence sufficiency' ruling.

136. *See, e.g.,* Cartier v. Lussier, 955 F.2d 841, 844-45 (2d Cir. 1992) (holding if factual determination is necessary predicate to resolution of qualified immunity issue, interlocutory review is not available); Wright v. Whiddon, 951 F.2d 297, 299 n.1 (11th Cir. 1992) (Although in this case there was no dispute about the underlying historical facts, the court noted that "[t]here is some conflict in our precedent whether we have jurisdiction over the denial of a qualified immunity summary judgment motion if the motion is denied because of a factual dispute."); Moffitt v. Town of Brookfield, 950 F.2d 880, 884 (2d Cir. 1991) (holding if a factual determination is necessary to the resolution of the issue of qualified immunity, immediate appeal is not permitted); Stewart v. Baldwin County Board of Education, 908 F.2d 1499, 1506-07 (11th Cir. 1990) (affirming denial of summary judgment where availability of qualified immunity turned on question of fact, but noted that several panels of this circuit have indicated that proper disposition in this context is to dismiss appeal for want of jurisdiction); Bennett v. Parker, 898 F.2d 1530 (11th Cir. 1990).

But see Burrell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 787-88 (11th Cir. 1992) ("Even assuming . . . that some facts remain disputed in this case, the mere existence of a factual quarrel does not affect the appealability of a denial of qualified immunity.").

137. Kulwicki v. Dawson, 969 F.2d 1454, 1460-61 (3d Cir. 1992) (recognizing that "Courts of Appeals do not take a uniform view of appellate jurisdiction over denials of immunity"). The court concluded:

> [o]ur jurisdiction to hear immunity appeals is limited only where the district court does not address the immunity question below, or where the court does not base its decision on immunity *per se* . . . . Insofar as there may be issues of material fact present in a case on appeal, we would have to look at those facts in the light most favorable to the non-moving party.

Id.; Austin v. Hamilton, 945 F.2d 1155, 1157 (10th Cir. 1991) (deciding that interlocutory appellate jurisdiction existed under *Forsyth*, even though a district court based its denial of motion on a finding that disputed material facts existed in the case); Johnson v. Hay, 931 F.2d 456, 459-60 (8th Cir. 1991) (holding that the court had jurisdiction to hear the appeal of an order denying the defendant's motion for summary judgment on qualified immunity grounds even though the appeal presented an issue that is not purely legal and concluding that a genuine issue of material fact existed as to whether a prison pharmacist

The justification is compelling for allowing interlocutory appeals under *Forsyth* from denials of qualified immunity on grounds that disputed issues of material fact preclude the granting of summary judgment. When a district court denies qualified immunity at the summary judgment stage because of genuine issues of material fact in dispute, the question of the materiality of the facts in dispute is a question of law.[138] The facts in dispute are material only if they are dispositive of the immunity issue; that is, if, viewing the facts and the inferences to be drawn from them in the light most favorable to the plaintiff, the conclusion is that a reasonable official would have understood that the defendant's alleged conduct violated clearly established law.

Ultimately, any denial of qualified immunity, whether or not the facts are in dispute, rests on the determination of a question of law, whether the facts as alleged by either the plaintiff or defendant support a claim that a reasonable official would have understood the conduct in question violated clearly established law.[139] A court's *deferral* of a qualified immunity decision to allow limited discovery and facilitate pretrial resolution of the issue should not be immediately appealable.[140]

At the motion to dismiss stage, if a court frames its order as a denial of qualified immunity, as opposed to a deferral of its decision pending a motion for summary judgment, the defendant runs a risk by taking an interlocutory appeal at this point. An appellate court faced with an interlocutory appeal from a denial of qualified immunity at the motion to dismiss stage has only the plaintiff's allegations in the complaint to review. Courts are reluctant to dismiss a complaint this early in the process if there are any facts alleged by the plaintiff which, if proved, would support the conclusion that the defendant violated a clearly es-

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reasonably could have believed that he was not violating the plaintiff's constitutional rights by refusing to fill prescriptions); Cinelli v. Cutillo, 896 F.2d 650, 653-54 (1st Cir. 1990) (deciding that the court of appeals had jurisdiction to review a district court's denial of qualified immunity on grounds that a genuine issue of material fact existed and explaining that in such review a court must examine discovered facts regarding the defendant's conduct relevant to the immunity claim, and, applying normal summary judgment principles, determine whether a genuine issue does or does not exist as to qualified immunity).

138. Cartier v. Lussier, 955 F.2d 841, 844-45 (2d Cir. 1992) (deciding whether disputed facts are material to resolving the applicability of the doctrine is a legal question subject to de novo review).

139. Chief Judge Tjoflat makes a persuasive case for this proposition in Bennett v. Parker, 898 F.2d 1530, 1534-37 (11th Cir. 1990) (Tjoflat, C.J., concurring).

140. *See, e.g.*, Workman v. Jordan, 958 F.2d 332, 335-36 (10th Cir. 1992) (holding that when a court allows limited discovery to develop or clarify facts needed to rule on a qualified immunity claim and defers decision on qualified immunity, such an order is not immediately appealable, but if the district court postpones its decision on qualified immunity until trial, the order is appealable).

tablished right.[141] Furthermore, the defendant is not likely to be afforded an opportunity to pursue a subsequent pretrial interlocutory appeal on the issue of qualified immunity.[142]

Because a *Forsyth* appeal divests the district court of jurisdiction to proceed with the trial,[143] there is considerable potential for abuse of the process by defendants who seek to delay the trial at plaintiff's expense. In *Apostol v. Gallion*,[144] Judge Easterbrook, expressing concern that defendants might invoke *Forsyth* appeals unjustifiably for such purpose, suggested that trial courts certify such appeals as frivolous and proceed with the trial.[145] Faced with a finding of frivolousness by the district court, the defendant would have to seek a stay from the court of appeals in order to bring the trial to a halt.[146] The district court must provide

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141. *See, e.g.*, McMath v. City of Gary, Ind., 976 F.2d 1026, 1031 (7th Cir. 1992) ("Although raising qualified immunity in a motion to dismiss . . . is permissible, it means that the only facts before [the court of appeals] in ruling on the motion are those alleged in the complaint, which must be taken as true."); Doe v. State of Louisiana, 974 F.2d 36, 37 (5th Cir. 1992):

> On review of a district court's denial of dismissal for failure to state a claim for which relief can be granted, we must accept as true all well-pleaded facts. The complaint is not subject to dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (citations omitted) The same is true when immunity is urged in a motion to dismiss.;

Pelletier v. Federal Home Loan Bank, 968 F.2d 865, 871 (9th Cir. 1992):

> If the district court determines that the defendant's entitlement to qualified immunity is not established at the motion to dismiss stage, he appeals at his peril. He may appeal immediately or he may answer the complaint and defer pursuit of his qualified immunity claim, and of appellate review of any denial of that claim, until it appears that a motion for summary judgment would be appropriate.

142. *See, e.g.*, Abel v. Miller, 904 F.2d 394, 397 (7th Cir. 1990) (holding that sequential appeals of pretrial orders denying qualified immunity are not authorized under *Forsyth*).

143. Apostol v. Gallion, 870 F.2d 1335, 1338 (7th Cir. 1989). Plaintiffs who resist a defendant's motion to stay the trial while the interlocutory appeal is pending and who fail to pursue a certification of frivolousness from the district court, may find themselves in the unfortunate position of plaintiff in Stewart v. Donges, No. 91-2073, 1992 WL 317622 (10th Cir. Nov. 6, 1992), who was denied any attorneys' fees for trial preparation and a trial that went forward after defendant had filed a notice of appeal. Holding the plaintiff "responsible for the district court proceeding with the trial," *id.* at *6, without jurisdiction, the court noted that "[t]his case exemplifies the precise problem that the Supreme Court in *Forsyth* was trying to avoid." *Id.*

144. 870 F.2d 1335 (7th Cir. 1989).

145. *Id.* at 1339. The court also observed that defendants might waive or forfeit their right not to be subject to trial by waiting "too long after denial of summary judgment," or "using claims of immunity in a manipulative fashion." *Id.*

146. *Id.*

a reasoned finding to accompany its certification of frivolousness,[147] and the Seventh Circuit has advised that "[t]he stamp of frivolity should only be used when a *Forsyth* appeal is 'unfounded.'"[148]

V. Qualified Immunity and Fourth Amendment Excessive Force Claims

Because there is still considerable disagreement about whether the qualified immunity defense makes sense in the Fourth Amendment excessive force context, it is worth noting the nature of the problem and some of the recent case law in this area.[149]

A necessary starting point for judges and lawyers involved in an excessive force case is to understand in what context the force was used to determine the appropriate constitutional standard. As the Tenth Circuit has noted:

> In determining whether a § 1983 claim involving excessive force by law enforcement officers has been stated the court must apply a constitutional standard. Three alternative constitutional standards have been utilized: 1) the Eighth Amendment's ban on cruel and unusual punishment; 2) the Fourth Amendment standard of 'objective reasonableness'; . . . and 3) the Fourteenth Amendment substantive due process standard which protects against use of excessive force that amounts to punishment.[150]

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147. *Id.*

148. McMath v. City of Gary, Ind., 976 F.2d 1026, 1031-32 (7th Cir. 1992).

149. For an excellent and more detailed analysis of the problem, see Urbanya, *supra* note 6.

150. Culver v. Town of Torrington, 930 F.2d 1456, 1460 (10th Cir. 1991). Discussion of the standards applied in the Fourteenth Amendment substantive due process context and the Eighth Amendment context is beyond the scope of this Article. The Supreme Court has yet to definitively establish the Fourteenth Amendment due process standard for excessive force claims. Multiple standards (e.g., recklessness, deliberate indifference, intentional conduct, conduct "shocking the conscience") have been articulated by the lower federal courts. *See, e.g.,* Frohmader v. Wayne, 958 F.2d 1024, 1027 (10th Cir. 1992) (Referring to *Glick* factors (see *infra* notes 151-52 and accompanying text) in deciding whether the force was excessive under due process clause, the court noted: "[t]he due process standard is more onerous than the Fourth Amendment reasonableness standard since the former requires, in addition to undue force, personal malice amounting to an abuse of official power sufficient to shock the conscience.").

See also Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991):

> We therefore hold that deliberate indifference is the level of culpability that pretrial detainees must establish for a violation of their personal security interests under the fourteenth amendment. We also hold that conduct that is so wanton or reckless with respect to the "unjustified infliction of harm as is tantamount to a knowing willingness that it occur," *Whitley*, 475 U.S. at 321, . . . will also

Prior to *Tennessee v. Garner*[151] and *Graham v. Connor*,[152] the majority of federal courts treated all excessive force claims as governed by a single standard: the standard set out by Judge Friendly in *Johnson v. Glick*.[153] Under this standard, established in a substantive due process context, courts would consider four factors: (1) the need for force, (2) the relationship between the need and the amount of force used, (3) the extent of injury inflicted, and (4) whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.[154]

After *Garner* and *Graham*, it is clear that the Fourth Amendment is the sole source of protection for a plaintiff who has been subjected to force in the context of "an arrest, investigatory stop, or other 'seizure'" of a free citizen.[155] The Fourth Amendment standard is one of "objective reasonableness," which requires the challenged conduct to be evaluated by looking at the totality of the circumstances from the perspective of a reasonable officer at the scene.[156]

Although *Anderson* makes it clear that qualified immunity is available as a defense to a Fourth Amendment claim of an unreasonable search, *Graham* leaves open the question of whether qualified immunity would apply in the excessive force case.[157] Because the Fourth Amendment

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> suffice to establish liability because it is conduct equivalent to a deliberate choice. . . . This may be termed "reckless indifference.";

Salazar v. City of Chicago, 940 F.2d 233, 238-39 (7th Cir. 1991) (holding that deliberate indifference is the proper standard for pretrial detainees). Deliberate indifference, in this circuit, is synonymous with intentional or criminally reckless conduct. *Id.* at 238.

For the standard in Eighth Amendment excessive force cases, see Hudson v. McMillian, 112 S. Ct. 995 (1992). The Court adopted the standard established in Whitley v. Albers, 475 U.S. 312 (1986), concerning force used in the context of a prison riot. The Court held the *Whitley* standard applicable "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause." *Hudson*, 112 S. Ct. at 999. In those circumstaces, "the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.*

151. 471 U.S. 1 (1985).

152. 490 U.S. 386 (1989).

153. 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973).

154. *Id.* at 1033.

155. *Graham*, 490 U.S. at 388.

156. *Id.* at 396. The factors to be considered include: (1) the severity of the crime, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether the suspect is actively resisting arrest or attempting to flee. *Id.* But see Moore v. Gwinnett County, 967 F.2d 1495, 1498-99 (11th Cir. 1992), in which the court determined "objective reasonableness" in a Fourth Amendment context by consideration of the *Glick* factors.

157. *See Graham*, 490 U.S. at 399 n.12 ("[T]he officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the

excessive force inquiry is governed by the same "objective reasonableness" standard as the qualified immunity inquiry, a number of courts and commentators have suggested that the qualified immunity defense is redundant in this context and does not apply.[158] Those adhering to this view would frame the question on the merits and the qualified immunity question in the same way: was the officer's conduct objectively reasonable given the totality of the circumstances?[159]

Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under § 1983."). Because the defense was not raised in *Graham*, the Court did not address the issue.

158. *See, e.g.*, Hopkins v. Andaya, 958 F.2d 881, 885 n.3 (9th Cir. 1992) (per curiam) ("In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits."); Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991):

> While qualified immunity is a powerful defense in other contexts, in excessive force cases the substantive inquiry that decides whether the force exerted by police was so excessive that it violated the Fourth Amendment is the same inquiry that decides whether the qualified immunity defense is available to the government actor.;

Hunter v. District of Columbia, 943 F.2d 69 (D.C. Cir. 1991) (Noting that several courts have concluded that qualified immunity is not available as a defense to Fourth Amendment excessive force actions under the objective reasonableness test of *Graham*, the court declared: "We too doubt whether a substantively distinct qualified immunity defense would be available to an officer acting after *Graham*, but we need not resolve that question here."); Yates v. City of Cleveland, 941 F.2d 444, 450 (6th Cir. 1991) (Suhrheinrich, J., concurring):

> I believe generally . . . that qualified immunity is not available in excessive force cases. . . . It seems to this writer that qualified immunity has no relevance unless there is excessive force, for if there is no excessive force, the officer acted in an objectively reasonable manner under the circumstances and there is no constitutional violation. It also seems that once you have determined the need for the defense of [qualified immunity], ... as a matter of law . . . the officer has acted unreasonably . . . and has violated clearly established law.

See also Jackson v. Hoylman, 933 F.2d 401, 402 (6th Cir. 1991) (acknowledging that the district court's conclusion that qualified immunity turns on the same objective reasonableness standard as does a claim of excessive force); Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (holding it was error for a jury to be instructed regarding qualified immunity defense after it found force used was unreasonable because after a jury concludes excessive force has been used, the inquiry is over and the question of objective reasonableness is foreclosed); Dixon v. Richer, 922 F.2d 1456, 1463 (10th Cir. 1991) ("[I]n excessive force claims asserted under the Fourth Amendment, the qualified immunity question is usually answered in the Fourth Amendment inquiry."); Berry v. City of Phillipsburg, Kansas, 796 F. Supp. 1400, 1404 (D. Kan. 1992) ("[I]n passing on a claim of excessive force in violation of the Fourth Amendment, the constitutional inquiry of reasonableness is the same inquiry that determines whether qualified immunity is available to the state actor in his individual capacity."); McDonald v. Haskins, 966 F.2d 292, 293 (7th Cir. 1992) ("[T]he relation between *Graham*'s purely objective test for excessive force claims and the comparable approach adopted in *Harlow v. Fitzgerald* for determining qualified immunity . . . is somewhat uncertain."). *See generally* Urbanya, *supra* note 6.

159. *See* Mahoney v. Kesery, 976 F.2d 1054, 1057 (7th Cir. 1992) (Judge Posner,

The majority of courts, however, find qualified immunity equally applicable in all Fourth Amendment contexts, including excessive force cases.[160] The qualified immunity defense is considered to provide an extra layer of protection to the officer, beyond her defense on the merits.[161] The qualified immunity question is not simply whether the officer's conduct was objectively reasonable under the circumstances, but is whether a reasonable officer *could have believed* his or her conduct to be lawful (i.e., objectively reasonable) under the circumstances.[162]

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somewhat puzzled by an analysis that calls for addressing the question of whether there was probable cause for an officer to believe he had probable cause, suggests that in a case challenging probable cause for an arrest, "the issue of immunity and the principal issue on the merits are one and the same.").

160. *See* Posr v. Doherty, 944 F.2d 91, 95 (2d Cir. 1991) (a qualified immunity defense is available to a police officer to meet claim of excessive force); Slattery v. Rizzo, 939 F.2d 213 (4th Cir. 1991) ("There is no principled reason not to allow a defense of qualified immunity in an excessive use of force claim."). The court decided the critical issue was whether a reasonable police officer could have had probable cause to believe that the appellee posed an immediate and deadly threat. *Id.* at 216; Hammer v. Gross, 932 F.2d 842, 850 (9th Cir. 1991) (rejecting the plaintiff's argument that an officer who has used unreasonable force cannot, by definition, have acted reasonably); Hamm v. Powell, 893 F.2d 293, 299 (11th Cir. 1990) (qualified immunity is available in excessive force cases); Brown v. Glossip, 878 F.2d 871, 873 (5th Cir. 1989) (finding no principled distinction between availability of qualified immunity as a defense to unreasonable searches and seizures and as a defense to excessive force claim under the Fourth Amendment); Ellis v. City of Indianapolis, 800 F. Supp. 733, 738 (S.D. Ind. 1992) ("If, based on the undisputed facts of the incident, a reasonable officer in [defendant's] position could have believed use of deadly force against [plaintiff] was constitutional, then [defendant] is entitled to immunity for his conduct.").

161. As David Rudovsky has pointed out, one danger of this extra layer of protection is that a whole body of subconstitutional law will develop in the Fourth Amendment context. Cases will be decided and disposed of on the basis of whether a reasonable officer could have believed he violated the Fourth Amendment reasonableness standard. "[T]he fourth amendment soon would be quite unknown, and the controlling standards would reflect the immunity rule, rather than the established concept of probable cause." Rudovsky, *supra* note 6, at 53.

See, e.g., Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (holding that officers seeking arrest warrants are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable."); Hoffman v. Reali, 973 F.2d 980, 985 (1st Cir. 1992) ("The issue in this case . . . is not whether [defendant] *in fact* had probable cause but whether his conclusion to that effect was sufficiently reasonable to afford him the protection of qualified immunity."); Thompson v. Reuting, 968 F.2d 756, 760 (8th Cir. 1992) ("The issue is not whether the affidavit actually establishes probable cause, but rather whether the officer had an objectively reasonable belief that it established probable cause."); Moore v. Gwinnett County, 967 F.2d 1495, 1497 (11th Cir. 1992):

> [T]he question before us . . . is not precisely whether probable cause existed in fact. When a law enforcement officer seeks summary judgment on the basis of qualified immunity, we only must ask whether, viewing the facts in a light favorable to the non-movant, there was *arguable* probable cause for the arrest.

162. Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

The clearest case for the availability of qualified immunity in the Fourth Amendment excessive force action is one in which the substantive constitutional standard controlling at the time of the challenged conduct differs from the standard governing the conduct in question under current law. A number of cases in the wake of *Graham* involve uses of force which, at the time of the events in question, were governed by the substantive due process standard of *Glick*, but which now are controlled by the Fourth Amendment objective reasonableness standard of *Graham*.[163] An officer's use of force in a particular context may be subjected to Fourth Amendment scrutiny under *Graham* in deciding whether plaintiff alleges a violation of a constitutional right under current law, but if the objective reasonableness standard was not established in the given context at the time of the conduct in question, qualified immunity should protect the officer, unless a reasonable officer would have understood her conduct to be unlawful under the standard then controlling.[164]

VI. Conclusion

Siegert changes the structure of the qualified immunity analysis, and *Bryant* insists that the immunity issue be resolved by the court as long before trial as possible. Because qualified immunity is an affirmative

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163. *See, e.g.,* Frohmader v. Wayne, 958 F.2d 1024, 1027 (10th Cir. 1992) (holding that although the Fourth Amendment objective reasonableness standard was controlling for purpose of assessing whether the plaintiff stated a constitutional claim for postarrest, prehearing use of excessive force, the availability of qualified immunity was determined by the law clearly established at the time, which was the substantive due process standard); Austin v. Hamilton, 945 F.2d 1155, 1162 (10th Cir. 1991) ("[F]ourth amendment standards govern the evaluation of defendants' qualified immunity defense for conduct in connection with plaintiffs' initial arrest, while substantive due process principles control the issue as to any excessive force employed thereafter."); Hannula v. City of Lakewood, 907 F.2d 129, 131 (10th Cir. 1990) ("While *Graham* sets forth the test for determining whether excessive force has occurred, it does not necessarily state the proper test for determining a defendant's qualified immunity from a claim of excessive force.") The test, for qualified immunity purposes, was under substantive due process standard in effect at time of challenged conduct. *Id.*

164. *See, e.g.,* King v. Chide, 974 F.2d 653, 657 (5th Cir. 1992) ("Although the standard for determining reasonableness in excessive use of force cases has evolved considerably since the date of conduct in question, objective reasonableness of challenged conduct must be judged by the standard that existed at time of conduct in question."); Fraire v. City of Arlington, 957 F.2d 1268, 1274 (5th Cir. 1992) (affirming qualified immunity, measuring the objective reasonableness of the defendant's conduct against excessive force standards in existence at the time in the Fifth Circuit); Finnegan v. Fountain, 915 F.2d 817, 821 (2d Cir. 1990) (holding that even if a jury finds the defendant to have used constitutionally excessive force, it is for the court to determine whether the unlawfulness of his conduct should have been apparent to defendant at the time).

defense, it must be pleaded by the defendant or it may be waived.[165] A defendant may invoke qualified immunity to avoid the burdens of discovery by making a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[166] When the defendant raises the qualified immunity defense by way of a motion to dismiss, the Court of Appeals for the Eleventh Circuit has noted:

> At this early stage in the proceedings, the Rule 12(b)(6) defense and the qualified-immunity defense become intertwined. Under Rule 12(b)(6), defendants can defeat plaintiffs' cause of action if the complaint 'fails to state a claim upon which relief can be granted.' . . . Under the qualified-immunity defense, defendants are immune from liability and even from trial if plaintiffs' complaint fails to state a violation of 'clearly established statutory or constitutional rights of which a reasonable person would have known.' . . . And as the Supreme Court has stated, '[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.'[167]

If the complaint fails *Siegert's* threshold inquiry in the qualified immunity analysis and does not allege the violation of a constitutional right under current law, then the complaint should be dismissed and

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165. Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635, 640-41 (1980). *See also* Buenrostro v. Collazo, 973 F.2d 39, 44 (1st Cir. 1992) ("Qualified immunity is . . . an affirmative defense, and the 'right' to have it determined in an intermediate appeal can be waived if it is not properly asserted below."); Kennedy v. City of Cleveland, 797 F.2d 297, 300 (6th Cir. 1986) ("Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense."), *cert. denied*, 479 U.S. 1103 (1987).

FED. R. CIV. P. 8(c) (1987) requires that any matter "constituting an avoidance or affirmative defense" be set forth affirmatively in a responsive pleading.

166. *See, e.g.*, D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1368 n.7 (3d Cir. 1992) (en banc):

> This court stated in *Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982), that the affirmative defense of qualified immunity could not be successfully asserted through a 12(b)(6) motion since it must be developed by affidavits at the summary judgment stage or at trial . . . We think that subsequent Supreme Court rulings have so undermined the rule enunciated in that case, that it is no longer viable.;

Jordan v. Fox, Rothschild, O'Brien & Frankel, 787 F. Supp. 471, 480 (E.D. Pa. 1992) ("Where, as here, a defendant contends that under the facts alleged in the complaint he is entitled to qualified immunity, there is no practical reason not to permit him to proceed by way of a motion to dismiss.").

167. Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992) (citing *Siegert*, 111 S. Ct. 1789 (1991)).

judgment entered for the defendant *on the merits*. A dismissal at this stage on the basis that the plaintiff has not alleged the violation of a constitutional right at all should not be treated as an order merely granting qualified immunity, from which no appeal can be taken, but should be viewed as a 12(b)(6) dismissal on the merits from which final judgment the plaintiff may appeal.

If the complaint passes the *Siegert* threshold, the defendant may still avoid the burdens of discovery if the complaint does not allege the violation of a constitutional right that was clearly established at the time of the conduct giving rise to the cause of action. *Anderson* demands that the contours of the right be framed with sufficient clarity so that a reasonable official would have understood the unlawfulness of her conduct. The court, in most cases, will be able to answer the question of whether the right was clearly established prior to any discovery. If no such right was clearly established, then the defendant should prevail on the motion to dismiss on qualified immunity grounds.[168]

In some cases, limited discovery may be needed on the qualified immunity issue in order to properly establish the contours of the right in question. A court may defer its decision on the immunity question, allow limited discovery to achieve the requisite factual development, and decide the immunity issue on summary judgment.[169]

At the summary judgment stage, the plaintiff must clear three hurdles. First, the plaintiff must satisfy *Siegert*'s threshold requirement and allege the violation of a constitutional right under current law. Second, plaintiff must prove that the contours of the right allegedly violated were clearly established at the time of the challenged conduct. Third, the plaintiff must set forth specific facts and evidence from which the court can conclude that a reasonable official, given the information possessed by the defendant at the time, would have understood the alleged conduct violated plaintiff's clearly established right.

It is at the third step in the summary judgment inquiry that factual disputes most often occur. These disputes often revolve around the circumstances, the facts known by the officer at the time, and the conduct of the officer. If, even accepting plaintiff's version of the facts, the court would still conclude that a reasonable officer could have believed his conduct lawful, then there is no issue of material fact and summary judgment should be entered.

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168. Depending on what other claims or parties are involved in the case, this dismissal may result in final judgment from which a plaintiff's appeal would lie.

169. *See, e.g.*, Mee v. Ortega, 967 F.2d 423, 430 (10th Cir. 1992) (factual disputes required more development before the district court could rule on qualified immunity); Lewis v. City of Ft. Collins, 903 F.2d 752, 758 (10th Cir. 1990).

The more common scenario exists when, given plaintiff's version of the facts, there would be no qualified immunity, while under defendant's version of the facts, qualified immunity would be available. Under this scenario, genuine issues of material fact exist. Assuming plaintiff has carried his or her burden of coming forward with "the minimum quantum of proof" needed to defeat the motion for summary judgment, the court should look at the facts in the light most favorable to the plaintiff (the nonmoving party), deny summary judgment on qualified immunity grounds, and let the case go to trial.

At this point the defendant has lost his or her immunity from suit, and an interlocutory appeal under *Forsyth* will be available. Given the approach outlined above, a district court's denial of a qualified immunity summary judgment motion must embrace the following conclusions of law:

(1) The plaintiff has asserted a valid constitutional claim upon which relief may be granted;
(2) The constitutional right defendant allegedly violated was clearly established at the time of the challenged conduct;
(3) When the facts are undisputed, a reasonable officer, given the facts and circumstances confronting this officer at the time, would have understood her conduct to have violated plaintiff's clearly established right;
(4) When the facts are in dispute:
    (a) looking at the facts in the light most favorable to the plaintiff, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights OR
    (b) even accepting the defendant's version of the facts, a reasonable officer would have understood her conduct to have violated plaintiff's clearly established constitutional rights.

These legal conclusions, inherent in any denial of qualified immunity on a motion for summary judgment, are the questions of law to be reviewed on a *Forsyth* appeal. Even when a court's only articulated reason for denying summary judgment is because there are material issues of fact in dispute, the assumption must be that these questions have been answered affirmatively. The question of law on which the denial of immunity turns is whether the facts in dispute are material to the issue of qualified immunity. The facts in dispute are material only if accepting plaintiff's version of the facts would result in the denial of qualified immunity.[170]

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170. *See* Cartier v. Lussier, 955 F.2d 841, 845 (2d Cir. 1992).

A reversal on any one issue will result in judgment for the defendant. If the appellate court decides that the district court erred in reaching the first conclusion (that the plaintiff asserted a valid constitutional claim), then there should be a judgment for defendant on the merits. A reversal on any other basis should result in a grant of immunity from suit for that officer.

Finally, it must be remembered that a pre-trial denial of qualified immunity, even if affirmed on appeal, or even if no appeal is pursued, does not mean that the officer has lost his qualified immunity from liability.[171] The qualified immunity defense may still be raised at trial by way of a motion for a directed verdict, or after trial by way of a motion for a judgment notwithstanding the verdict.[172] Furthermore, special interrogatories may be put to the jury on the issues of fact determinative of the qualified immunity issue, allowing the judge to decide the ultimate legal question of whether, given the facts as decided by the jury, qualified immunity from liability is available to the official.[173]

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171. *See, e.g.*, Apostol v. Gallion, 870 F.2d 1335, 1339 (7th Cir. 1989) ("[T]he right not to pay damages and the right to avoid trial are distinct aspects of immunity, and the former may be raised on appeal at the end of the case even if defendants bypass their right to appeal under *Forsyth* before trial."); Pesek v. City of Brunswick, 794 F. Supp. 768, 792 (N.D. Ohio 1992):

> The defense of qualified immunity thus allows a government official to invoke the 'historic right' to be free from liability for money damages, as well as from litigation itself. Consequently, where the trial court rejects the defense on the motions, the § 1983 defendant remains free to raise it again as a defense to liability.

172. *See, e.g.*, Sims v. Metropolitan Dade County, 972 F.2d 1230, 1234 (11th Cir. 1992):

> Implicit in the district court's order [denying qualified immunity without prejudice] is a conclusion that, although [plaintiff's] allegations suffice to survive a motion for summary judgment, he may be unable to adduce sufficient evidence to survive a motion for a directed verdict based on qualified immunity. [I]f the district court had been correct in denying the Defendants' motion for summary judgment, it would not have been error to allow the Defendants to reassert the qualified immunity contention during the trial.

See also Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 48 (1st Cir. 1988) ("We emphasize . . . that while we uphold the denial of qualified immunity at this stage in the proceedings, this does not prevent the qualified immunity defense from being further considered . . . when the record is more complete.").

173. *See, e.g.*, Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1579 n.8 (Edmondson, J., dissenting) ("[A]part from finding qualified immunity on a directed verdict or a JNOV, the judge can and, when needed, should use special verdicts or written interrogatories to the jury to resolve disputed facts before the judge rules on the qualified-immunity question.").

The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?

TONI LESTER*

INTRODUCTION

Public response to the accusations made by Anita Hill during the Clarence Thomas Supreme Court nomination hearings makes it clear that people differ when it comes to determining whether certain conduct is acceptable or whether it is sexual harassment.[1] As one major study of more than 20,000 federal government employees showed, men tended to feel that the problem of sexual harassment in the workplace was greatly exaggerated, while women did not.[2] Given these differing perspectives, whose point of view should be adopted to determine what constitutes sexual harassment in a court of law?

The law has traditionally delegated the responsibility for answering this question to the "reasonable man" (more recently called the "reasonable person"), a mythical individual who is supposed to represent a composite of society's highest values. The reasonable person test purports to establish liability objectively by asking the question: "What would the reasonable person have perceived in the same situation?" Although some

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1. *See Who's Telling The Truth?*, BOSTON GLOBE, Oct. 15, 1991, at 57. *See also* Ellen Goodman, *A Reasonable Standard*, BOSTON GLOBE, Oct. 13, 1991, at 83 (quoting University of Michigan law professor Kim Lane Scheppele, who said, "[M]en see the sex first and miss the coercion, women see the coercion and miss the sex."); *How Not to Vex Your Female Colleague*, ECONOMIST, Oct. 12, 1991, at 26.

2. The study of federal government employees, conducted by the U.S. Merit Systems Protection Board, showed that 44% of men and 23% of women thought that the problem of sexual harassment was greatly exaggerated. The study also showed that men were more likely to believe that the victims brought the harassment on themselves. OFFICE OF MERIT SYS. REVIEW AND STUDIES, U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FED. WORKPLACE, IS IT A PROBLEM? 31 (1981)[hereinafter 1981 MERIT STUDY]. *See also* U.S. MERIT SYS. PROTECTION BD., SEXUAL HARASSMENT IN THE FED. GOV'T: AN UPDATE (1988) [hereinafter 1988 MERIT STUDY] (This follow-up to 1981 MERIT STUDY showed that six years later, the problem of harassment had remained virtually unchanged.).

believe that the test is a fair standard for assessing liability,[3] others criticize it for preserving the status quo — an elite white-male power structure that treats women unfairly.[4] The controversy over this test is particularly heated in cases in which it is alleged that sexual harassment has created a hostile work environment. In 1986, the United States Supreme Court ruled that sex-based behavior that creates such an environment is an illegal form of sex discrimination.[5] There still seems to be a wide "perception gap" in the federal courts, however, when it comes to determining whether a work environment is sufficiently hostile to support a sexual harassment claim.

Courts have adopted two decidedly different approaches in making their determinations. At one end of the spectrum is the reasonable person standard articulated by the majority in *Rabidue v. Osceola Refining Co.*[6] This standard attempts to evaluate whether the conduct in question would interfere with the "hypothetical reasonable individual's work performance and seriously affect the psychological well-being of that reasonable person under like circumstances . . . ."[7] Applying this test, the Court of Appeals for the Sixth Circuit found that women who are subjected to certain kinds of workplace harassment are not entitled to legal redress because such harassment is pervasive and tolerated by the society at large.[8]

At the other end of the spectrum is the reasonable woman (or victim) test espoused by the dissent in *Rabidue* and by the majority in the Ninth Circuit case *Ellison v. Brady*.[9] This test asks the question: Would a reasonable *woman* find the conduct in question offensive?[10] In contrast

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3. *See* Nancy Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1181 (1990) (discussing the traditional 19th century view of the reasonable person test).

4. *See* Kim Lane Schepple, *The Reasonable Woman*, THE RESPONSIVE COMMUNITY, Fall 1991, at 36, 41. *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991); Ehrenreich, *supra* note 3.

5. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

6. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). It should be noted that some judges expressly refer to the reasonable person test but implicitly use the reasonable woman test. *See* Watts v. New York City Police, 724 F. Supp. 99, 104 (S.D.N.Y. 1989)(although the court said that it would review the plaintiff's allegations from the perspective of a "reasonable person facing the same situation," the court also cited an article that advocated the reasonable victim standard to support its analysis). For the purposes of this Article, the words, "the reasonable person test," will be used to refer to a specific mode of analysis that fails to place any significant emphasis on the reactions and experiences of the "reasonable woman." The specific characteristics of the test will be elaborated on in Part II.

7. *Rabidue*, 805 F.2d at 620.

8. *Id.* at 622.

9. 924 F.2d 872 (9th Cir. 1991).

10. *Id.* at 879. *See also Rabidue*, 805 F.2d at 627 (Keith, J., dissenting).

to *Rabidue*, the majority in *Ellison* attempted to counteract, not tolerate, what it saw to be a pattern of unfair harassment against women. Since to date the United States Supreme Court has not reviewed the standards set down in either *Rabidue* or *Ellison*, each federal circuit court is left to its own devices when determining which standard to apply. This Article has two purposes. The first purpose is to introduce the reader to the principal characteristics of both the reasonable person and the reasonable woman tests. It is this author's belief that if the United States Supreme Court were to require federal courts to uniformly apply the reasonable woman test to sexual harassment cases, women would win harassment suits much more often than they would if the reasonable person test were used.[11] The second purpose of this Article, therefore, is to show how the reasonable woman test will affect the outcomes of future harassment cases. This will be accomplished by looking at several previously decided sexual harassment cases in which the employer prevailed in order to show how the reasonable woman test might have caused the decisions in those cases to turn out differently. It is hoped that by looking at cases in this manner, conclusions can be drawn about how similar cases might be decided in the future.

To accomplish these objectives, Part I of this Article will examine the sources of sexual harassment law, including Title VII of the Civil Rights Act of 1964,[12] the Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment,[13] and *Meritor Savings Bank v. Vinson*,[14] the United States Supreme Court decision that set the ground rules for the sexual harassment decisions under discussion.

Part II will cover the main components of the reasonable person test, including a discussion of the way in which the test was initially used in both negligence and rape law. For an analysis of how the test later evolved in sexual harassment law, Part III will examine how it was used in *Meritor* and *Rabidue*. Part IV will examine the reasonable woman test, as it was described by the dissent in *Rabidue*, by the majority in *Ellison*, and in a more recent Florida case, *Robinson v. Jacksonville Shipyards, Inc.*[15]

Using its distinguishing elements, the reasonable woman test will then be applied in Part V to five cases that rejected the sexual harassment claims under review. This analysis will reveal that the plaintiffs in all

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11. Indeed, there seems to be a growing trend in this direction already. *See* Eric J. Wallach and Alyse L. Jackobson, *Reasonable Woman Test Catches On*, NAT'L L.J., July 6, 1992, at 21-26.

12. 42 U.S.C. § 2000e (Supp. II 1991).

13. 29 C.F.R. § 1604 (1991).

14. 477 U.S. 57 (1986).

15. 760 F. Supp. 1486 (M.D. Fla. 1991).

but one of those cases would have won had the reasonable woman test been used.[16] The conclusion of this Article will address the implications of these findings for both employees and business managers.

I. Sources of Sexual Harassment Law

A. Title VII and EEOC Regulations

It is illegal under Title VII of the Civil Rights Act of 1964 for employers to discriminate on the basis of sex, race, religion or national origin.[17] Although the term "sex" was originally added to the statute to stifle its passage,[18] Title VII has since become the chief source of sexual harassment law.

It was not until the late 1970s that courts began to acknowledge that sexual harassment was a form of sex discrimination under Title VII.[19] In 1980, the EEOC officially began to refer to the term "sexual harassment" when it issued guidelines which made the following types of conduct illegal: unwanted "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[20] The guidelines also state that a harassment claimant must have been subjected to at least one of the following three situations:

> (1) the harassment was made either explicitly or implicitly a term or condition of the plaintiff's employment, (2) employment de-

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16. It should be noted that courts sometimes find simultaneously that the plaintiff was sexually harassed and that the employer should not be held liable. This happens when an employer successfully convinces a court that it should not be held vicariously liable because it was not aware that the plaintiff was being harassed. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1212 n.119, 1213 (1989) ("[M]ost courts have required some knowledge on the part of the employers, particularly when the harassment was perpetuated by a coworker."). In addition, a victim may quit her job and later sue her employer on the grounds that she was constructively discharged because of the harassment. In such cases, courts have occasionally found that, although the harassment took place, the company should not be held liable because it took appropriate steps to remedy the situation. *See* Yates v. Avco, 819 F.2d 630, 637 (6th Cir. 1987). This Article, however, will only focus on the extent to which the courts have ruled on the victim's claim that she was sexually harassed, notwithstanding a possible ultimate finding for the employer on other grounds.

17. 42 U.S.C. § 2000e (1988 & Supp. II 1991).

18. *See* Charles and Babara Whalen, The Longest Debate - A Legislative History of the 1964 Civil Rights Act 115-118 (1985) (discussing how civil rights foe Judge Howard Smith proposed that the word "sex" be added to Title VII so that the law would become so controversial that no one in Congress would vote in favor of it). *See also* Franncis J. Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431, 439-43 (1966).

19. *See* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); Barnes v. Costle, 561 F.2d 983 (1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977).

20. 29 C.F.R. § 1604.11(a) (1991).

> cisions about the plaintiff were made based on the extent to which he or she submitted to or rejected the harassment, or (3) the harassment had the purpose or effect of *unreasonably interfering with the plaintiff's work performance or creating an intimidating, hostile, or offensive working environment.*[21]

Despite the EEOC's guidelines, however, many courts were not willing to review hostile work environment claims.[22] Even though women who work in hostile environments do so at enormous emotional cost,[23] these courts apparently believed that Title VII was only designed to punish quid pro quo harassment (i.e., harassment that causes some type of tangible economic loss).[24] The United States Supreme Court, however, ultimately rejected this view in *Meritor*, and held that hostile work environment claims should be just as actionable as quid pro quo harassment claims.[25]

B. Meritor Savings Bank v. Vinson[26]

The United States Supreme Court rendered its first sexual harassment decision in the *Meritor* case. Michele Vinson, a teller-trainee at Meritor Savings Bank, alleged that she had been forced to have sex with her boss on numerous occasions because she was afraid of losing her job.[27] At trial, the district court rejected Vinson's claim and concluded that she had not been subjected to quid pro quo harassment.[28] However, the court never questioned whether Vinson might have been psychologically harmed by her supervisor's behavior and therefore entitled to pursue a hostile environment claim. Deciding that the district court's analysis was therefore flawed, the Supreme Court remanded the case to evaluate whether Vinson's boss had created a hostile work environment.[29]

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21. *Id.* (emphasis added).

22. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986) (discussing the district court's findings that the plaintiff's claims were not actionable because her harassment did not have an economic effect). *See also* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Marguerite Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987).

23. *See* Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 84, 85 n.6 (1984-1985) (discussing how harassment victims experience a variety of stress-related symptoms, including high blood pressure, ulcers, insomnia, and anxiety).

24. For a discussion of quid pro quo harassment, see CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979).

25. 477 U.S. at 67.

26. 477 U.S. 57 (1986).

27. *Id.* at 59.

28. *Id.* at 67.

29. *Id.*

The *Meritor* decision was a mixed blessing for sexual harassment victims. First, the highest court in the country expressly acknowledged that sexual harassment was, in fact, a form of sex discrimination under Title VII. Second, the Court supported the EEOC's position that harassment resulting solely in psychological harm could also be actionable under Title VII. However, the Court also implicitly endorsed the use of the reasonable person test in sexual harassment law. This last aspect of the decision would prove to have troubling consequences for subsequent harassment victims.

The reasonable person test makes some of its earliest appearances in both negligence and rape law. A discussion of its use in these two areas will provide insight into how it is now being used in sexual harassment law, and why it is so controversial.

II. The Reasonable Person Test in Negligence and Rape Law

A. Negligence Law

Generally, a person will be found guilty of negligence if it can be shown that a person's conduct created an *unreasonable* risk of harm to others.[30] In a negligence case, the courts ask: "what would the reasonable person . . . have done under the same circumstances as those in which the defendant found himself".[31] Although some regard is given to what the defendant *actually thought*, negligence defendants are presumed to possess "certain basic knowledge common to the community"[32] and are judged by the extent to which they do (or do not) follow the dictates of that knowledge.

For example, a judge in a negligent-driving suit may conclude that a reasonable person would not knowingly drive a car with brakes dangerously in need of repair. But what if the defendant had decided that he could maneuver the car safely on his own just before he got into a car accident? The judge would still probably find the defendant negligent because, in the judge's mind, the defendant's perspective was not within the range of societal expectations about reasonable behavior. Thus, this particular car owner would be compared to the reasonable car owner, someone who only exists in the abstract.

Theoretically, courts defer to existing societal norms when they try to determine if the type of conduct described above is reasonable under the circumstances. Proponents of the reasonable person test believe that by so adhering to community standards, judges are able to render neutral

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30. Edward J. Kionka, Torts in a Nutshell 48 (1992).
31. *Id.* at 50.
32. *Id.* at 51.

and unbiased decisions.[33] But to what extent is a particular judge or a jury really able to ascertain the community's perspective in a negligence case? In all likelihood, the judge in this example will simply consult his or her own intuition to determine how the community would view the defendant's behavior. Thus, there exists great potential for personal bias to taint the decision-making process.

An additional problem arises when one realizes that the underlying presumption of the reasonable person test—that some type of consensus exists about basic social interactions—may be flawed. The standard assumes that there is enough of an agreement in the community to create a consensus in the first place. However, many believe that, contrary to being a melting pot of values, America is made up of myriad subgroups, divided along racial, gender, and a variety of other lines, each possessing unique and sometimes conflicting perspectives.[34] Feminist legal scholars note that the flaw in the reasonable person test is particularly apparent in cases that focus on male-female relationships. For marginally empowered groups like women, they argue, courts use the reasonable person test to make decisions about women in a paternalistic manner.[35] To support this view, they point to the way in which rape law has been used to unfairly discriminate against women victims—the very group that the law is supposed to protect.[36]

B. Rape Law

Many of the underlying premises of sexual harassment law are derived from early rape law.[37] In rape law, courts traditionally used the reasonable person test to focus on the issue of consent. Until quite recently, in order to prevail in most rape cases the prosecution had to show that a woman was forced to have sexual intercourse without her consent.[38] Consent was found when the court concluded that *the defendant perceived*

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33. *See* Erenreich, *supra* note 3, at 1181.

34. *See generally* Scheppele, *supra* note 4.

35. *Id.* at 36.

36. *Id.* at 38.

37. For an in-depth discussion of the parallels between these two areas of law, see generally Estrich, *supra* note 4.

38. Although this is the language used in most common law rape cases, the rape reform statutes of the 1970s and 1980s were heavily influenced by the Model Penal Code redefinition of rape, which suggested that rape be defined as sex that results from force or the threat of imminent death. *See* SUSAN ESTRICH, REAL RAPE 61 (1987) (Courts continue to unduly focus on the victim by interpreting the new statutes to mean that rape occurs if "force . . . is used to overcome female nonconsent."). *See also* Estrich, *Sex at Work*, *supra* note 4, at 814 (Reform efforts, which tried to reshift the focus from consent to force, "were short-sighted at best" because "the inquiry has too often remained focused on . . . the woman's role in provoking, and accepting . . . the rightness of her rape.").

that consent was given.[39] The fact that the victim *actually* did not want to have sex was often disregarded by the courts.

A close examination of rape law reveals that judges who apply the reasonable person test have often focused "to an unusually high degree on the actions, reactions, motives, and inadequacies of the victim . . . [as opposed to] those of the defendant."[40] Support for this conclusion can be found in the following list of situations in which women were deemed to have given their consent:

(1) The woman did not physically resist the unarmed rapist;[41]

(2) The woman assumed the risk of being raped by placing herself in what was deemed to be an obviously dangerous situation;[42]

(3) The woman had the type of sexual fantasies and/or sexual life that demonstrated to the court that she had a propensity to want to have sex with the alleged rapist;[43]

(4) The woman wore the type of clothing that demonstrated to the court the rapist was justified in finding her sexually provocative;[44] or

(5) The woman's credibility was questioned because she failed to report the rape immediately after it occurred.[45]

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39. *See* MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR, THE SOCIAL COST OF RAPE 58 (1991).

40. Estrich, *Sex at Work*, *supra* note 4, at 815.

41. *See* State v. Rusk, 424 A.2d 720, 734 (Md. 1981) (Cole, J., dissenting). *But see* GORDON & RIGER, *supra* note 39, at 58-59 (describing how some states have adopted rape statutes that liberalize the resistance requirement by weighing a variety of factors, like the age of the victim and her strength relative to the rapist).

42. *Rusk*, 424 A.2d at 734.

43. *See* GORDON & RIGER, *supra* note 39, at 59 ("[L]awyers infer that an unchaste woman would be more likely than a virtuous woman to agree to have intercourse with an assailant."). *But see id.* at 65 (discussing how some states, like Michigan, have eliminated the use of the victim's sexual history as evidence in rape cases).

44. *See* Christopher Boyd, *Accuser's Underwear Can Be Used as Evidence*, BOSTON GLOBE, Oct. 31, 1991, at 25 (The writer discusses the fact that the judge in the William Kennedy Smith rape trial agreed to let the defense admit evidence about the condition of the alleged rape victim's bra and underpants ostensibly for the purpose of refuting the victim's claims that a struggle took place. The prosecutor objected to the evidence by arguing that the defense was trying to convince the jury that "any woman who buys underwear at Victoria's Secrets can't be a victim of a sexual assault."). *Compare* E.R. Shipp, *Tyson Found Guilty on 3 Counts as Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at A1, B15 (discussing how the prosecutor in boxer Mike Tyson's rape trial emphasized the victim's lack of intent to have sex with Tyson by pointing to the supposedly nonprovocative clothing that she wore, which included "pink polkadotted pajama bottoms . . . underneath the three piece floral print outfit she hastily threw on when going to meet Mr. Tyson").

45. *See* E.R. Shipp, *Bearing Witness to the Unbearable*, N.Y. TIMES, July 28, 1991, at 2 (The writer discusses a gang rape trial brought by a 22-year-old woman against six St. John University male students. One juror justified his refusal to convict the men by saying that he was "bothered that it took the woman more than two weeks to report the incident to campus authorities.").

The case of *State v. Rusk*[46] demonstrates how some judges have used the reasonable person test to conclude that a woman consented to have sex with an alleged rapist. The court in *Rusk* focused on the circumstances described in items 1 and 2 on the foregoing list. In this case, a woman agreed to give a man that she met in a singles bar a ride home. When she declined his invitation to come up to his apartment, he grabbed her car keys and refused to return them to her unless she came inside with him. Because she was in what she perceived to be a dangerous and unfamiliar part of town, she agreed to go inside. Once inside, he began to lightly choke and undress her and told her that if she had sex with him, he would give her back the car keys. Crying, she agreed.[47] From his perspective, the woman consented to have sex. From her perspective, she was raped.

The Maryland trial court convicted the man of rape, but eight out of the thirteen judges sitting on the intermediary appeals court overturned the conviction. Finally, on appeal, the highest court in Maryland split four to three in favor of upholding the defendant's conviction.[48]

Agreeing with the intermediary court's decision, the dissent in *Rusk* vehemently disagreed with the majority's conclusion that the woman did not consent to have sex. Despite the fact that she said she believed that physical resistance would have caused her rapist to retaliate even more violently, the dissent criticized the woman for not resisting anyway. Absent such resistance, the dissent concluded that it was reasonable for the man to think that the woman wanted to have sex.[49]

In adopting this belief, the dissent was expressing what leading rape law scholar Susan Estrich has described as the "traditional male notion . . . [that] in a fight the person attacked fights back."[50] Margaret T. Gordon and Stephanie Riger, authors of the book *The Female Fear, The Social Cost of Rape*, have said that the theory underlying this notion is that "persons worthy of the protection of the law would defend their virtue by undergoing a significant degree of other physical harm before submitting to a sexual attack."[51] Studies have shown, however, that women fear that their very lives are in danger when they are confronted by a

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46. 424 A.2d 720 (Md. 1981).

47. *Id.* at 721-723.

48. *Id.* at 720.

49. *Id.* at 728-38 (Cole, J., dissenting) ([P]otential rape victims "must follow the *natural instinct of every proud female to resist*, by more than mere words . . . unless the defendant has *objectively* manifested his intent to use physical force . . . ." (emphasis added)).

50. Susan Estrich, Real Rape 62 (1987).

51. Gordon & Riger, *supra* note 39, at 59.

rapist.[52] In response to such fears, many women feel that it is safer for them not to resist when they are attacked.[53] This may be because, in general, women, while children, are taught not to fight or defend themselves.[54]

Thus, the reasonable person test, in this instance, may actually be the *reasonable man* test, a test that requires women to do the very thing that they have been told by society not to do. The implications of this view for sexual harassment victims are far reaching. What type of resistance must a woman show to prove that she does not welcome the sexually charged overtures of her supervisor? If she remains silent in response to propositioning or vulgar remarks in the workplace, will her silence be equated with consent by the courts?[55] If a woman fails to use her company's grievance procedures, will her hesitation later cause her credibility to be questioned?

The dissent in *Rusk* also expressed the belief that the victim assumed the risk of being raped when she agreed to give her rapist, a stranger she met in a singles bar, a ride home. Assumption of risk is a defense available in negligence law. Generally, this defense allows a defendant to argue that a plaintiff should not be able to recover for injuries caused by the defendant's negligence because the plaintiff chose to engage in conduct with the defendant while being aware of the dangers associated with that conduct.[56]

The dissent in *Rusk* used the assumption of risk argument to point out that the rape victim was a "woman *familiar* with the social setting in which these two actors met. . . . She got out of the car, . . . and followed him up the stairs to his room. She *certainly had to realize* that they were not going upstairs to play Scrabble."[57] Furthermore, by downplaying the fact that she stated that she was afraid of being in a dangerous

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52. SUSAN BROWNMILLER, AGAINST OUR WILL, MEN WOMEN AND RAPE 401 (1976) (discussing Boston College study of 80 rape victims).

53. *Id.* at 403 (discussing 1971 study by sociologist Menachem Amir of 646 rape cases in the Philadelphia area).

54. GORDON & RIGER, *supra* note 39, at 60.

55. Even courts that have shown some sympathy for the victim's perspective have expressed confusion over what the relationship between silence and unwelcomeness in sexual harassment law. *See* Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988) ("In some instances a woman may have the responsibility of telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome."). Note that the court in this case did not describe specific situations in which silence would be an acceptable response to harassment.

56. KIONKA, *supra* note 30, at 116.

57. State v. Rusk, 424 A.2d 720, 734 (Md. 1981) (Cole, J., dissenting) (emphasis added).

neighborhood at night,[58] the dissent implied that the victim deserved to be raped because she should have known better.

As the foregoing list indicates, some courts have also allowed testimony about the victim's sexual fantasies and sexual history to be used to discredit her.[59] Some courts have even concluded that a victim's manner of dress is probative of her intent to consent to the sexual overtures of an alleged rapist.[60] Susan Estrich has noted that this is why it is "often the victim [who is] victimized a second time by a legal system which focused more on determining her fault than that of the man's."[61] There has been a tendency for many courts to adopt this same approach in sexual harassment law.

III. The Reasonable Person Test in Sexual Harassment Law

Using the reasonable person test in a manner that is consistent with its use in rape law, some courts have declared that a woman welcomes sexual harassment under one or more of the following set of circumstances:

(1) The woman assumed the risk of her harassment by choosing to take a job where the harassment occurs;[62]

(2) The woman was sexually active or had sexual fantasies prior to being harassed;[63]

(3) At the time of the harassment, the woman spoke or dressed in such a manner that was deemed to be provocative by a court;[64] or

(4) The woman was silent when she was harassed or failed to report the harassment immediately after it happened.[65]

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58. *Id.* at 734 ("It was an ordinary street . . . .").

59. For example, during the notorious New Bedford Rape trial in 1984, in which four of six men were convicted of raping a woman in a pool hall, the court allowed testimony to be introduced that indicated that the victim was lonely because she had not been sexually active for several months. *See* Kristin Bumiller, *Fallen Angels: The Representation of Violence Against Women in Legal Culture*, *in* At The Boundaries of Law, Feminism And Legal Theory 95, 106 (Martha Albertson et al. eds., 1991). *See also* Estrich, Real Rape, *supra* note 38, at 43 (citing State v. Anderson, 137 N.W.2d 781, 783, n.2 (1965) in turn quoting Glandville Williams, Corroboration - Sexual Cases 662-71 (1962)). For an in-depth discussion of the history of this aspect of rape law, see also Brownmiller, *supra* note 52, at 409-20 (1976).

60. *See* Boyd, *supra* note 44.

61. Estrich, *Sex at Work*, *supra* note 4, at 813.

62. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

63. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

64. *Id.*

65. *See* Waltman v. International Paper Co., 875 F.2d 468, 484 (5th Cir. 1989) (Jones, J., dissenting) (discussing the significance of the fact that the plaintiff never relied on the company's grievance procedures). *See also* Sparks v. Pilot Freight Carriers, Inc.,

The above list reveals that some judges hold certain basic assumptions about how men and woman should relate to one another in the workplace. Some of these assumptions were directly sanctioned by the United States Supreme Court's decision in *Meritor*.

A. Meritor and the Reasonable Person

The EEOC guidelines state that harassment must be "unwelcome" for it to be actionable.[66] The unwelcomeness requirement is analogous to the lack of consent requirement in rape law. As has been previously discussed, courts that use the reasonable person test in rape law have often allowed evidence about the victim's clothing and speech to be used to prove that the victim consented to be raped. Apparently believing that this type of analysis unfairly blamed the victim, the court of appeals in *Meritor* refused to allow the defendant to introduce testimony about the plaintiff's manner of dress or her sexual fantasies into evidence.[67] The United States Supreme Court, however, disagreed.

The Supreme Court explained that "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is *obviously* relevant."[68] The Court also acknowledged that there was no per se rule against allowing testimony into evidence about the plaintiff's publicly expressed sexual fantasies.[69] However, the Court gave no guidance on how provocativeness should be measured or by whom, or what limits should be placed on the admissibility of testimony about a victim's sexual fantasies.[70]

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830 F.2d 1554, 1566 (11th Cir. 1987) (Hill, J., dissenting) ("[W]here it is found that the supervisor's behavior was ambiguous, i.e. less than overtly offensive, a second finding must be made as to whether the plaintiff, by some objective action at the time of the allegedly offensive conduct *displayed objection* to the conduct of the supervisor." (emphasis added)).

66. 29 C.F.R. § 1604.11(a) (1991).

67. *Meritor*, 477 U.S. at 67.

68. *Id.* at 69 (emphasis added).

69. *Id.* at 67, 71.

70. Determining sexual provocativeness can be a very subjective process. Wendy Pollack describes a situation in which men and women held decidedly different views about whether a particular woman was provocative. The incident took place in a student cafeteria in a carpentry school:

> Whenever a woman walked through the cafeteria, especially a young woman, the place would go wild. The men would shout, whistle and howl . . . . One woman in particular was a favorite target . . . . She wore the same white painters' pants that all the other painters wore. There was nothing in her dress or manner that welcomed the men's behavior. . . . I asked my fellow carpenters . . . "What is going on here?" Their response was, "she's asking for it. Look at the way she wears those pants." The [woman] avoided the cafeteria after that.

Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 57 n.73 (1990).

Further evidence that the Court condoned the use of the reasonable person test can be found when one looks at how it addressed the hostile work environment issue. As has been mentioned, the EEOC guidelines state that the harassment must either "unreasonably interfere with an individual's work performance . . . [or create] an intimidating, hostile, or offensive working environment."[71] The Court, however, expanded this description by stating that for "harassment to be actionable, it must [also] be sufficiently *severe* or *pervasive* 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"[72]

By adding the italicized words, the Supreme Court minimized the experiences of harassment victims and drastically raised the standard that victims would have to meet in harassment cases. For example, under the EEOC guidelines, harassment victims simply had to show that they were made to feel "timid or fearful," because this is the literal definition of the term "intimidating."[73] However, following the Supreme Court's ruling, a complainant would also have to show that the harassment was "diffused throughout *every part of*"[74] her job situation.

This new standard seems to recognize only harassment that occurs in the most extreme and outrageous cases.[75] As one author has explained, the Court essentially chose "to evaluate claims not by the offender's actions, but by how much a woman can tolerate."[76] Judges in subsequent cases have thus been able to justify their rejection of harassment claims by arguing that the harassment was not frequent enough[77] or long-lasting enough[78] to be pervasive and therefore actionable pursuant to *Meritor*.

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71. 29 C.F.R. § 1604.11(a)(3) (1991).

72. *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904) (11th Cir. 1982)).

73. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 634 (1987).

74. *Id.* at 878 (defining the word "pervasive").

75. Pollack, *supra* note 70, at 60-61.

76. *Id.* at 60 n.88.

77. *See* King v. Board of Regents, 898 F.2d 533, 539-40 (7th Cir. 1990) ([T]he court found that suggestive remarks and touching constituted sexual harassment because they were "unwelcome *repeated acts*" occurring over a four-month period. (emphasis added)); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) ([T]he court said that plaintiff must demonstrate that the psychological "injury resulted not from a single or isolated offensive incident . . ., but from incidents . . . that occurred with some frequency."); Scott v. Sears Roebuck Co., 798 F.2d 210, 214 (7th Cir. 1986) ("[T]he comments and conduct of other mechanics is too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim."); Kaufman v. Amtax Planning Corp., 669 F. Supp. 572, 573 (S.D.N.Y. 1986) ([A] plaintiff had to show "more than a few isolated incidents of sexual harassment . . . sporadic conversation [is] insufficient.").

78. *See, e.g.*, Barbetta v. Chemlawn Serv. Corp., 669 F. Supp. 569, 573 (W.D.N.Y. 1987) ([T]he alleged harassment "amounted to more than sporatic conduct" and "incidents took place over a period of 2 years.").

Critics of the use of the reasonable person test have thus complained that *Meritor* enabled courts to look "to the victim, not for her perspective on what behavior she affirmatively . . . accepts . . . nor for what is [actually] harmful to her,"[79] but for the purposes of defining her reality "through the eyes of the perpetrator."[80] In constructing its own version of the reasonable person test, the court in *Rabidue* borrowed liberally from *Meritor* to seek a similar result.

B. Rabidue v. Osceola Refining Co.[81]

The sexual harassment claim in *Rabidue* was brought by Vivienne Rabidue, an administrative assistant, against her employer, Osceola Refining Company. Rabidue charged that she had been repeatedly subjected to vulgar remarks made by a coworker, Douglas Henry, and to the photos of naked and scantily dressed women in the offices of other male coworkers. Henry customarily called women in the company "whores" and "cunts" and specifically referred to Rabidue as a "fat ass."[82] Neither the company nor the court disputed Henry's use of vulgarities or the presence of the photos.[83]

After she was fired from her job for insubordination, Rabidue sued the company for sexual harassment. In her claim, she asserted that both Henry's comments and the photo displays created a hostile work environment.[84] Agreeing with the district court's decision to deny Rabidue's claim, Judge Krupansky, speaking for the majority, gave what is perhaps the purest description of the reasonable person test to date: "[I]n the absence of conduct which would interfere with that *hypothetical reasonable individual's work performance* and affect seriously the psychological well-being of that *reasonable person under like circumstances*, a plaintiff may not prevail . . . regardless of whether the plaintiff was actually offended by that defendant's conduct."[85]

In purporting to speak on behalf of the hypothetical reasonable person, however, the court made no attempt to ascertain what the society at large, and women in particular, would have thought about Henry's vulgarities or pornographic displays. More importantly, the court did not try to determine if men or women had conflicting perceptions about the

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79. Pollack, *supra* note 70, at 60.
80. *Id.* at 62.
81. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).
82. 805 F.2d at 624 (Keith, J., dissenting).
83. *Id.* at 615.
84. *Id.* at 614-15.
85. *Id.* at 620 (emphasis added).

type of harassment that women complain about.[86] In contrast to *Rabidue*, the courts in both *Robinson v. Jacksonville Shipyards, Inc.* and *Ellison v. Brady*, which will be discussed in Part IV, did make such an effort.

Instead, the majority in *Rabidue* emphasized what it believed to be the victim's personal inadequacies. It found that Rabidue was "abrasive, rude, [and] antagonistic."[87] Ironically, the court also acknowledged that she was a "capable, independent, [and] ambitious"[88] employee who had been consistently promoted over a three-year period.[89] However, the court made no attempt to reconcile these conflicting characterizations by trying to determine if the photo displays or Henry's vulgarities were the real cause of Rabidue's antagonistic behavior.[90] Finally, even though the court admitted that Henry was an "extremely vulgar and crude individual,"[91] it decided that the company was justified in firing Rabidue.

The majority also stated that judges in sexual harassment cases should consider the "lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into the environs, coupled with the *reasonable expectation of the plaintiff upon entering that environment.*"[92] In adopting this view, the court intimated that Rabidue assumed the risk of being harassed when she took a job with the company.[93] However, the court never attempted to determine whether or not Rabidue actually knew about Henry or the posters before she took the job. Thus, the assumption of risk analysis seems to be largely based on conjecture.

It would appear that even if Rabidue had been able to show that she was unaware of the risks associated with working for Osceola, the court would still have rejected her claim. As the majority stated:

> Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to — or can — change this. Although Title VII is the federal court mainstay in the struggle for equal employment opportunity for female workers . . . it is quite different to claim that Title VII was designed to bring

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86. It is also interesting to note that the 1981 MERIT STUDY, *supra* note 2, which demonstrated that the two sexes have different perspectives about this issue, had been published and available for five years by this time, but the court did not rely on it.

87. *Rabidue*, 805 F.2d at 615.

88. *Id.*

89. *Id.* at 614-15.

90. *Compare* Tunis v. Corning Glass Works, 698 F. Supp. 452, 460 (S.D.N.Y. 1988) ([T]he "unfriendliness induced by a hostile work environment can hardly justify the firing of the employee who was subject to that environment.").

91. *Rabidue*, 805 F.2d at 615.

92. *Id.* at 620 (emphasis added).

93. *Id.* at 620-21.

about a magical transformation in the social mores of American workers.[94]

The court also minimized any emotional trauma that Rabidue may have experienced by stating that the nude posters and Henry's remarks, "although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."[95] Furthermore, the majority belittled Rabidue's harassment by placing it within the context of a larger "society that condones and publicly features and commercially exploits open displays of written and pictorial erotica."[96] Since *Rabidue* disavowed the psychological effects that the Osceola work environment may have had on Rabidue and, instead, stressed her personal inadequacies and the voluntariness of her behavior, there are strong parallels in this decision with the decisions in the rape cases discussed earlier. The use of the reasonable person test thus poses serious problems for women whose experiences are in conflict with the values and perspectives of judges who apply the test to excuse harassment. As Catherine MacKinnon has noted: "If the pervasiveness of an abuse [in society] makes it non-actionable, no inequality sufficiently institutionalized to merit a law against it would be actionable."[97] Judges who use the reasonable woman test, however, claim that many of the problems posed by *Rabidue* can be avoided if more attention is given to the victim's perspective.

IV. The Reasonable Woman Test in Sexual Harassment Law

As the discussion below will show, judges who use the reasonable person test and judges who use the reasonable woman test often hold strikingly different beliefs about the way in which men and women should relate to one another in the workplace and the extent to which sexually charged behavior should be actionable under Title VII. One of the most impassioned pleas for the adoption of the reasonable woman test was first made by Judge Keith in his dissenting opinion in *Rabidue*.

A. Rabidue's Dissenting Opinion

Objecting to the majority's decision, Judge Keith criticized the court for failing "to account for the wide divergence between most women's

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94. *Id.* at 621 (quoting Rabidue v. Osceola Ref. Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

95. *Id.* at 622.

96. *Id.*

97. Catherine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 115 (1987).

views of appropriate sexual conduct and those of men."[98] Keith also chastised the majority for arguing that Rabidue assumed the risk of her harassment by deciding to work for Osceola. As he explained, "no woman should be subjected to an environment where her . . . sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative . . . ."[99]

In Judge Keith's view, the majority was wrong to minimize the psychological impact that pin-up posters and vulgar comments can have on female employees. He said, "pervasive societal approval . . . [of pornography] . . . stifles female potential and instills the debased sense of self-worth which accompanies stigmatization."[100] Finally, Judge Keith remarked that the new test would shield employers from neurotic complainants because it relies on pertinent sociological data about men and women in general.[101]

Although he did not sway the majority in *Rabidue*, Judge Keith's proposed new standard has since gained considerable momentum in the courts. His call for a test that gives increased consideration to the underlying sociological differences that exist between men and women, received special attention in both *Ellison* and *Jacksonville Shipyards.*

B. Ellison v. Brady[102]

The plaintiff in *Ellison* worked as a revenue agent for the Internal Revenue Service (IRS) in California. Unlike the work environment in *Rabidue*, which included vulgar remarks and pornographic photos, Ellison's harassment was limited to the conduct of one specific coworker, Sterling Gray. Gray harassed Ellison over a period of almost four months.[103]

First, Gray invited Ellison to lunch. Then he invited her to go out for a drink after work and to have lunch with him again. She did go to lunch with him the first time, something commonly done by coworkers in her office. However, she declined his last two requests. Gray then began to send Ellison a series of notes in which he professed his romantic interest in her. His first note said, "I cried over you last night and I'm totally drained today . . . ."[104] This was followed by another note, which said, "I have enjoyed you so much over these past few months. Watching

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98. *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting) (citing Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984)).

99. *Id.* at 626-27.

100. *Id.* at 627.

101. *Id.* at 626.

102. 924 F.2d 874 (9th Cir. 1991).

103. *Id.* at 873-84.

104. *Id.* at 874.

you. Experiencing you from O so far away. . . . [We] are striking off such intense sparks."[105]

Intimidated by Gray's overtures, Ellison first asked a coworker to try to convince Gray to stop. When the coworker was not successful, Ellison then complained to Gray's supervisor, who temporarily removed Gray to another job site. However, Gray continued to write to Ellison. Finally, when Ellison learned that Gray would be returning to work in her office within six months, she decided to press charges against the IRS for failing to protect her from being harassed further.[106] At the trial, the district court concluded that Ellison had overreacted to Gray's behavior, which it characterized as isolated and trivial.[107] The court of appeals, however, disagreed with this characterization.

Noting that "Title VII's protection of employees from sex discrimination should come into play long before the point where victims of sexual harassment require psychiatric assistance,"[108] the court of appeals concluded that the perspective of the reasonable victim (not the reasonable person) should be used to evaluate whether Ellison's harassment was sufficiently severe and pervasive to be actionable.[109] Specifically, the court ruled that:

> In order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment.[110]

By adopting this view, the court found that what many men view as harmless, many women find threatening. The court supported this assertion by citing Justice Department and FBI statistics, which showed that women are the primary victims of rape.[111] In light of these statistics, the court observed that it is reasonable for women to fear that harassment will escalate to violent sexual assault.[112] Within this context, the court acknowledged that Ellison was understandably frightened by Gray's behavior because she "didn't know what he would do next."[113] As such,

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105. *Id.*
106. *Id.* at 874-75.
107. *Id.* at 876.
108. *Id.* at 878.
109. *Id.*
110. *Id.* at 879.
111. *Id.* at 879 n.10.
112. *Id.* at 879.
113. *Id.* at 874.

the court concluded that a reasonable woman in Ellison's place would have had the same reaction to Gray.[114]

Many of the court's comments are supported by the *1981 Merit Study* cited in the Introduction to this Article. The study showed that men tend to think that the problem of sexual harassment is greatly exaggerated while women do not.[115] In fact, the court referred to a follow-up to the *1981 Merit Study*, the *1988 Merit Study*, to support its contention that sexual harassment is still a major problem.[116] This practice of relying on objective sociological data to construct a reasonable woman standard was further expanded upon in *Jacksonville Shipyards*.

C. Robinson v. Jacksonville Shipyards, Inc.[117]

The court in *Jacksonville Shipyards* relied on an extensive record of expert testimony concerning how women are negatively impacted by sexual harassment.[118] The court used this evidence to create a hypothetical reasonable woman[119] and compare the plaintiff in the case to that woman. Based on this comparison, the court found that the plaintiff's reactions were reasonable under the circumstances.

The plaintiff in *Jacksonville Shipyards*, Lois Robinson, worked as a first class welder at Jacksonville Shipyards, Inc. from 1977 to 1988. Women in the shipyard, at their peak, numbered only seven out of 1,101 employees as skilled craftworkers. During her tenure at the company, Robinson alleged that she was subjected to two types of sexual harassment. First, pictures of nude and partially nude women appeared throughout the shipyard, and were possessed by or displayed on the walls and in the offices of low-level employees and management alike.[120] The decision lists almost three pages of examples which describe an abundance of photographic displays of women in a variety of sexually demeaning or provocative poses.[121]

Second, Robinson said that she was personally subjected to sexually provocative remarks made by several male coworkers. The remarks included such comments as, "I'd like to get in bed with that,"[122] and

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114. *Id.* at 880.
115. 1981 MERIT STUDY, *supra* note 2.
116. *Ellison*, 924 F.2d at 881 n.15.
117. 760 F. Supp. 1486 (M.D. Fla. 1991).
118. *Id.* at 1502-07.
119. *Id.* at 1507 n.4.
120. *Id.* at 1493-94.
121. For example, there was a drawing on a wall showing the frontal view of a naked female torso with the words 'USDA Choice' written under it, *id.* at 1495, and a calendar showing a naked woman bending over to show her buttocks and genitals. *Id.* at 1496.
122. *Id.* at 1498.

"Watch out for Chet. He's Chester the Molester."[123] In addition, the walls of Robinson's work area were littered with obscene images and comments directed towards her. Both the allegations concerning the photos and the personalized attacks on Robinson were verified by the testimony of two other female coworkers.[124]

Although both Robinson and her two female coworkers convinced the court that they were *personally* offended and intimidated by the harassment complained of, the court stated that in order for Robinson to prevail, she would have to show that a *reasonable woman* "would perceive that an abusive working environment [had] been created."[125] For an evaluation of how women in general would react to the shipyard work environment, the court thus sought the advice of two experts on sexual harassment. Both experts concluded that women in general would have had the same reaction as Robinson.

One expert, a professor of psychology and an expert on sex-stereotyping, explained that studies have shown that pornography in the workplace caused men to view women coworkers as sex objects.[126] She also noted that there was a tendency in situations in which women were in the minority for male managers to trivialize complaints brought by women about sexual harassment.[127] Another expert, a consultant specializing in preventing sexual harassment, explained that women typically have a variety of reactions to harassment, ranging from total denial and avoidance of the problem—engaging in sexual banter in order to diffuse the situation—to filing formal complaints. Since most women fear reprisals, however, the expert said that few ever formally complain.[128]

Relying on the above testimony, the court criticized *Rabidue* for overestimating the general public's reaction to pornography and for failing to recognize that women cannot avoid pornography in the workplace as easily as they can avoid it in public.[129] The court also concluded that "the cumulative, corrosive effect of [the shipyard] environment over time [would have affected] the psychological well-being of a reasonable woman placed in [the same] conditions."[130] Robinson was thus able to win her suit because the court believed that a reasonable woman faced with the

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123. *Id.*

124. *Id.* at 1499.

125. *Id.* at 1524.

126. *Id.* at 1503.

127. *Id.* at 1504.

128. *Id.* at 1506.

129. *Id.* at 1526 ("Pornography in the workplace may be far more threatening to women workers than it is to the world at large. Outside . . . [it] can be protested or substantially avoided—options that may not be available to women disinclined to challenge their employers.").

130. *Id.* at 1524-25.

same harassment would have been justifiably intimidated by that harassment.

It is clear from the above discussion that the reasonable woman test can be an aggressive champion of the rights of sexual harassment victims. But is it really the panacea that many legal scholars say it is? Part V will attempt to answer this question by applying the test to five post-*Meritor* sexual harassment cases that were decided in favor of the employer.

V. Application of the Reasonable Woman Test to Five Post-Meritor Cases

The courts in the five cases to be discussed in this section all used the reasonable person test either explicitly or implicitly to conclude that the harassment complained of did not create a hostile work environment. The analysis below will show that, in four of the five cases, the decisions would have been different had the reasonable woman test been used. The main characteristics of the reasonable woman test will be derived from the analysis of the *Ellison* and *Jacksonville Shipyards* decisions covered in Part IV. Each case will be discussed in chronological order, with the earlier cases being covered first.

A. Jones v. Flagship International[131]

Benita Jones, the plaintiff in this case, was an attorney who worked as a manager for equal employment opportunity programs at Flagship International. Her duties included investigating discrimination complaints against the company and representing the company in lawsuits. While working for the company, Jones claimed that her married supervisor, Jared Metze, propositioned her during business trips on three separate occasions over a period of several months. During one of those trips, Metze was alleged to have asked Jones to accompany him to a hotel because, as he put it, she needed the "comfort of a man."[132] Jones said that she turned down all of Metze's requests.[133]

Jones also testified that when a company vice president made figures of bare-breasted mermaids to be used as table decorations during an office party, Jones complained in writing on behalf of herself and other female employees that the decorations were offensive. She received a written reprimand about her complaints from the same vice president.[134]

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131. 793 F.2d 714 (5th Cir. 1986).
132. *Id.* at 716.
133. *Id.*
134. *Id.* at 717.

Eventually, Jones filed a race and sex discrimination suit against the company for unequal pay and sexual harassment, respectively.[135] After that, the company fired her because it claimed, among other things, that she had an unacceptable conflict of interest because of the suit.[136]

The district court concluded that, even if the harassing incidents described by Jones had actually taken place, the harassment was neither pervasive enough to create an abusive work environment[137] nor serious enough to have adversely affected Jones.[138] The court of appeals agreed with this decision.[139]

The two courts tied the seriousness of Jones' harassment to the number of times that it occurred. Although advocates of the reasonable woman test also believe that it is important to focus on the quantitative characteristics of harassment, some argue that a plaintiff's claims should not be dismissed solely because she failed to meet some arbitrarily set numerical test. As the court in *Ellison* indicated, an isolated act, if it is serious enough, should be enough to constitute illegal harassment.[140]

Using this approach, Metze's supervisory role would be subject to much greater scrutiny. The *1988 Merit Study* showed that men and women almost uniformly agree that uninvited pressure for sex *from a supervisor* should constitute illegal sexual harassment.[141] The survey sponsor opined that supervisor harassment may be especially dangerous because supervisors have the power to retaliate against complaining employees by undermining their job status.[142] Also, a supervisor can affect a victim's future job prospects by giving her poor job references.

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135. She ultimately dropped her race discrimination charges. *Id.* at 718.

136. *Id.* at 717.

137. *Id.* at 720, 720 n.6.

138. *Id.* at 720 n.6, 721 n.7.

139. *Id.* at 721, 729.

140. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (citing King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990) ("[A]lthough *a single act can be enough* . . . repeated incidents create a stronger claim . . ., with the strength of the claim depending on the number of incidents and the intensity of each incident." (emphasis added)). *See also* Watts v. New York City Police Dept., 724 F. Supp. 99, 105 (S.D.N.Y. 1989) ("Conduct less pervasive, but more offensive in form and effect, than slurs and epithets can so poison a working environment as to render it abusive. Physical assaults of a sexual nature obviously constitute incidents that tend to satisfy this criterion of severity."). *See also* Abrams, *supra* note 16, at 1212 (criticizing the *Flagship* decision, Professor Abrams said that "some behavior—such as an ambiguous sexual request from a supervisor—is so inherently coercive, or so powerful in its ability to sexualize, that a single incident may be sufficient to poison the atmosphere for a woman employee.").

141. 1988 MERIT STUDY, *supra* note 2, at 13 (99% of the women and 95% of the men surveyed agreed with this).

142. *Id. See also* 1981 MERIT STUDY, *supra* note 2, at 30 ("The discrepancy may imply that since supervisors hold positions of power, their behavior should be exemplary.").

Furthermore, because the *Ellison* court ruled that propositions from a coworker were illegal under Title VII, it probably would have found Metze's conduct to be particularly offensive because Metze was Jones' supervisor. This, coupled with the evidence about the company's insensitivity to the bare-breasted decorative displays, probably would have been enough to convince the *Ellison* court that Jones was subjected to a hostile work environment.

Like the court in *Flagship*, the court in the following case also ignored the hierarchical relationship that existed between the plaintiff and one of her alleged harassers.

B. Scott v. Sears, Roebuck & Co.[143]

Scott was one of the only two females who participated in a mechanic trainee program at Sears, Roebuck & Co. in Chicago. The program was specifically designed to train women for jobs traditionally held by men. Scott was put under the tutelage of a senior mechanic, Eddie Gadberry. Scott alleged that Gadberry asked her out for dates and responded to her requests for advice or help by saying, "What will I get for it?"[144] Scott also alleged that Gadberry made suggestions that she give him a rub down. In addition to Gadberry's remarks, Scott also complained that one male coworker once slapped her on her buttocks, and that another commented that she "must moan and groan while having sex."[145] Scott did not report these incidents to anyone until after she was fired and had decided to sue Sears for sex discrimination.[146]

The court of appeals said that, assuming that all of Scott's complaints were true, the Sears work environment was not sufficiently hostile to support Scott's sexual harassment claim. Citing *Meritor*, the court noted that Gadberry's comments were not pervasive enough or psychologically debilitating enough to affect Scott's work performance.[147]

A court applying the reasonable woman test, however, might have viewed the Gadberry-Scott relationship from Scott's perspective and decided the case very differently. Scott was a trainee on probation and Gadberry was assigned to train her. Through his performance evaluations, Gadberry had the power to influence whether or not Scott could remain at Sears after her probation ended.[148] In many ways their relationship

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143. 798 F.2d 210 (7th Cir. 1986).
144. *Id.* at 211.
145. *Id.* at 212.
146. *Id.* at 211-12.
147. *Id.* at 213-14.
148. The court noted that Gadberry gave Scott a good evaluation on one occasion. However, this evaluation was given in the absence of any complaints having been made by Scott and before she filed her suit. *Id.* at 212.

was similar to the employee-supervisor relationship discussed in the *Flagship* case above. Within this context, absent some overt indication from Scott that she was interested in Gadberry, Gadberry's requests for dates appear to be improper because of the unique position that he held over Scott.

As for the harassment from Scott's coworkers, which included battery, the court maintained that it was "too isolated and lacking the repetitive and debilitating effect necessary to maintain a hostile environment claim."[149] However, the *Jacksonville Shipyards* court cautioned that courts should not "carve the work environment into a series of discrete incidents . . . [without taking into account the fact that] the impact of separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes."[150] Using this reasoning, it could be argued that, to a reasonable woman, Gadberry's comments and the harassment from her coworkers had the *cumulative* effect of creating an unreasonably hostile work environment for Scott.

In fact, the *Ellison* court expressly criticized the way in which the court in *Sears* evaluated Scott's harassment. Characterizing Scott's overall harassment as "egregious,"[151] the *Ellison* court chastised the *Sears* decision for failing to sufficiently focus on the overall impropriety of the harassment that Scott had to tolerate. The court in *Ellison* implied that, by their very nature, certain types of conduct have a debilitating effect on women. "Surely," the court noted, "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they . . . require psychiatric assistance."[152]

Because she did not complain about the harassment until after she was fired, the court in *Sears* also questioned Scott's contention that she was seriously offended by Gadberry's behavior. By questioning Scott's credibility in this manner, the court chose to ignore the possibility that Scott may have failed to report the harassment because she feared reprisals, and not because she found the harassment acceptable. Indeed, the *1988 Merit Study* indicates that some employees fear taking any action at all because they are afraid that their jobs will be made unpleasant afterwards.[153]

However, it is not immediately clear how the *Ellison* court would have specifically addressed this issue. The plaintiff in *Ellison* behaved very differently from Scott. Prior to having filed her suit, Ellison first

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149. *Id.* at 214.

150. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1525 (M.D. Fla. 1991).

151. Ellison v. Brady, 924 F.2d 872, 877 (9th Cir. 1991).

152. *Id.* at 878.

153. 1988 MERIT STUDY, *supra* note 2, at 27.

complained to a coworker about her harasser. Soon after that, she talked to her supervisor about it.[154] Given the fact that the *Ellison* opinion condemned the *Scott* decision,[155] however, it is possible that Scott's credibility would not have been categorically dismissed by the *Ellison* court on this issue alone.

In contrast to *Ellison*, the *Jacksonville Shipyards* case directly addresses this topic. In *Jacksonville Shipyards*, the court noted that it would have been ineffective for the plaintiff to complain to her union representatives because the representatives themselves had engaged in the offensive conduct under review.[156] Thus, if Scott could have produced evidence to show that the Sears management had also engaged in or tolerated harassing behavior in the past, her reasons for not complaining might have been understandable to the *Jacksonville Shipyards* court. Furthermore, the court might have even decided that it was reasonable for Scott to *assume* that Sears would not have responded well to her grievances because many other women share this same fear. In making this determination, the court might have relied on the *1988 Merit Study*, which showed that harassment victims often feared that they would be reprimanded or ignored if they complained to management.[157]

As the above indicates, Scott would probably have won her suit if the reasonable woman standard had been used. This would have also been the case for the next plaintiff, who, among other things, alleged that she was harassed by someone who held a supervisory position over her.

C. Lipsett v. University of Puerto Rico[158]

Anabelle Lipsett was enrolled as a resident intern in a five-year General Surgery Residency Training Program at the University of Puerto Rico School of Medicine. During her tenure in the Program, thirty-one men and five women were enrolled as residents. It was the general practice in the Program for the junior residents to work under the supervision of more senior residents. Lipsett claimed that her harassment consisted of receiving sexually suggestive comments and propositions, and being forced to view pornographic material in the hospital.[159]

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154. *Ellison*, 924 F.2d at 874.

155. *Id.* at 877.

156. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1517 (M.D. Fla. 1991).

157. 1988 MERIT STUDY, *supra* note 2, at 27-28. *See also* MACKINNON, *supra* note 24, at 49 (1979) ("Those who complain, as well as those who do not, express fears that their complaints will be ignored, will not be believed, that they instead will be blamed, . . . or told . . . that they are blowing it all out of proportion.").

158. 864 F.2d 881 (1st Cir. 1988).

159. *Id.* at 886-88.

The alleged harassment occurred on several levels. First, she charged that the male residents displayed pornographic centerfolds on the walls of the resident dining and meeting room, as well as a sexually explicit drawing of her own body. This was further exacerbated by a list that the male residents put on the bulletin board in the same room, which referred to the plaintiff as '' ' Selastraga,' translated to literally mean 'she swallows them.' ''[160] Lipsett's testimony about the pornographic wall displays was corroborated by another female intern.[161]

Finally, Lipsett complained that two male residents offered to protect her from being harassed if she would have sex with them. When she complained to the chief resident about this, she was told that it was common for a junior female resident to be involved with a senior resident in order to make it easier for her to get through the program.[162]

In a parallel suit before the same court against the Veterans Administration Hospital,[163] Lipsett complained that during a rotation to do training at the Veterans Hospital, one senior resident, Dr. Novoa, humiliated her in front of a patient by saying that Lipsett was going to give the patient pleasure during Lipsett's administration of a rectal sigmoidoscopy. Dr. Novoa was also alleged to have told Lipsett that women could not be relied upon to do surgery when they were "in heat."[164]

Largely ignoring most of Lipsett's allegations, the district court granted motions for summary judgements for both defendants. It found that the harassment at the University of Puerto Rico caused no debilitating effects and that Lipsett's problems were due largely to her lack of tact in dealing with the male residents in the Program.[165] With respect to Dr. Novoa's remarks, the district court found that they were "too isolated and infrequent to be considered sufficiently severe or pervasive."[166] The court also belittled Lipsett's complaints by saying that her failure to report Dr. Novoa was proof that she had not been emotionally harmed by his comments.[167] Ironically, the court stated that it used the reasonable woman test to render its decision.[168] However, because the court minimized the overall impact of the harassing incidents on Lipsett, its analysis is more typical of the reasonable person test.

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160. *Id.* at 888.
161. *Id.* at 904.
162. *Id.* at 888.
163. *Id.* at 1197.
164. Lipsett v. Rive-Mora, 669 F. Supp. 1188 (D.P.R. 1987), *rev'd*, 864 F.2d 881 (1st Cir. 1988).
165. Lipsett v. University of P.R., 864 F.2d 881, 904 (1st Cir. 1988).
166. *Rive-Mora*, 669 F. Supp. at 1204.
167. *Id.*
168. *Id.* at 1199.

Using the reasonable woman test, the court in *Jacksonville Shipyards* would have probably characterized the pornography on the dining and meeting room wall as a visual assault on Lipsett's sensibilities.[169] This characterization is particularly appropriate since the pictures were placed on the walls of a room that Lipsett could not avoid, especially since it was the room where meals were served and staff meetings took place. The court would have also noted that the presence of the magazine pictures, combined with the sexual caricature of Lipsett and the degrading nickname that the male residents used for her, served to unduly sexualize the work environment and to denigrate Lipsett's professional accomplishments.[170]

Both the *Ellison* and *Jacksonville Shipyards* courts probably would have also found that Dr. Novoa's comments were unreasonably offensive. As the discussion of the *Flagship* and *Sears* cases shows, the two courts probably would have believed that Dr. Novoa placed Lipsett in an untenable position because of his supervisory role. Either she endured his comments in order to continue to remain under his tutelage or she reported him and risked his giving her unusually difficult or demeaning assignments.

In light of the above analysis, the two courts would have found that Lipsett was subjected to a hostile work environment at both the Veterans Hospital and the University of Puerto Rico. In fact, the district court decision was reversed and remanded on appeal because the court of appeals felt that Lipsett had made out a prima facie case of sexual harassment.[171]

Unlike the previous four cases, which involved heterosexual harassment, the plaintiff in the next case alleged that she was harassed by her homosexual boss.

D. Fair v. Guiding Eyes for the Blind[172]

Kimberly Fair worked as the Associate Director of Admissions for Guiding Eyes for the Blind, Inc., a company that taught people how to use guide dogs. She complained that Martin Yablonski, the executive

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169. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1495 (M.D. Fla. 1991).

170. *See Id.* at 1505 ("A second effect of stereotyping is denigration of the individual merit of the person who is stereotyped.").

171. Lipsett v. University of P.R., 864 F.2d 881, 914 (1st Cir. 1988) (holding that the district court should have required the defendant to submit evidence to refute Lipsett's claims). The court of appeals also directed the district court to analyze the case from both a male *and* female perspective. *Id.* at 898.

172. 742 F. Supp. 151 (S.D.N.Y. 1990).

director of the company, regularly spoke to her about his homosexuality and gossiped about the sexuality of other people. On one occasion, Fair claimed that Yablonski said that he knew about the homosexual secrets of a married man. On another occasion, Yablonski commented that the women at a particular meeting had been " 'salivating [about another man at the meeting] and thinking about all that slurpy sex!' "[173] Finally, Fair said that Yablonski challenged her religious views about abortion and homosexuality.[174]

Fair claimed that Yablonski's comments constituted actionable sexual harassment and that he fired her after she made it clear to him that she found his comments offensive. However, the district court rejected her arguments. Expressly applying the reasonable person test, the court said that a plaintiff in a sexual harassment suit must show that but for her sex, she would not have been harassed.[175] Although it characterized Yablonski's comments as "petty, inappropriate . . . and unprofessional,"[176] the court concluded that they did not single her out just because she was a woman.[177] In addition, the court held that Yablonski's remarks posed no direct sexual threat to Fair since she said that he was a homosexual and not interested in women.[178]

It is possible that a court using the reasonable woman test would have rendered the same decisions in this case. Although Yablonski did hold a position of power over Fair, it is unlikely that the *Ellison* or *Jacksonville Shipyards* courts would have believed that he unfairly abused that power to exploit Fair because she was a female.

In both *Ellison* and *Jacksonville Shipyards*, the harassment consisted of personal comments or propositions that were related to a man's *specific sexual interest in the plaintiff or his stated sexual interest in women in general.* The court in *Ellison* sought to protect women from the underlying threat of violence that it believed was implicitly present in heterosexual harassment.[179] Thus, because Yablonski made it very clear that he was only interested in men, the *Ellison* court probably would have concluded that it was not reasonable for Fair to feel sexually threatened by him.

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173. *Id.* at 153.

174. *Id.*

175. *Id.* at 156 (citing Barnes v. Costle, 561 F.2d 983, 990 & n.55 (D.C. Cir. 1977)).

176. *Id.* at 155.

177. *Id.* at 156 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802; Rabidue v. Osceola Ref. Co., 805 F.2d. 611, 619-20 (6th Cir. 1986); Henson v. Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)).

178. *Id.* ("Comments of a homosexual nature, directed at a man, on the other hand, might be considered to be based on sex.").

179. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).

However, had Fair been either a heterosexual or a homosexual man, Yablonski's comments might have been found to be more obviously offensive and threatening to Fair.[180] Thus, under both a reasonable person and a reasonable woman analysis, Fair's claims probably would have been denied.

The last case to be discussed in this section, *Burns v. McGregor Electronic Industries*,[181] is noteworthy because the plaintiff's personal life was used to discredit her sexual harassment claim.

E. Burns v. McGregor Electronic Industries

Burns worked for McGregor Electronics, a stereo speaker manufacturing company owned by Paul Oslac. Burns alleged that Oslac constantly harassed her by talking about sex, showing her pornographic magazines, making lewd gestures, and inviting her out for dates.[182] Although Burns complained to her supervisor about Oslac, nothing was done to stop his conduct. In fact, Burns complained that her supervisor teased her about Oslac and that she was also harassed by several coworkers. Eventually, Burns quit her job because she said that the McGregor work environment made her upset and nervous.[183]

Over a two-and-a-half-year period, Burns returned a second time to work for McGregor Electronics, quit once more, and returned a third and final time. She said that she kept going back because she needed the work to support herself, her father, and her brother.[184] During these last two periods, employees at the company learned that Burns had appeared nude in a motorcycle magazine, and some employees began to gossip about her and call her vulgar names.[185] In addition, Oslac continued to proposition and physically harass her.[186] Burns finally quit her job for the last time, because, as she put it, the work environment was "hostile and offensive."[187]

The district court acknowledged that Burns did not welcome Oslac's advances and that coworkers at the company had ostracized her both

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180. *See* MacKinnon, *supra* note 24, at 205 ("Sexual coercion from a gay male superior presents one of the few situations in which an uninterested male employee has a chance of facing a situation similar to that which many women employees commonly confront every day.").

181. 955 F.2d 559 (8th Cir. 1992).

182. *Id.* at 559-60.

183. *Id.* at 560.

184. *Id.* at 561.

185. *Id.* at 560.

186. *Id.* at 561 (Once, when other employees were present, Oslac grabbed Burns and "cupped his hand as if to grab her breast.").

187. *Id.* at 562.

before and after they learned about the magazine photo. However, in the court's view, because of Burns' "willingness to display her nude body to the public . . . her testimony that she was offended by sexually directed comments and Penthouse or Playboy pictures [was] not credible."[188]

By focusing on Burns' outside sex-related activities (i.e., the nude magazine), the court applied the reasonable person test in a manner that was consistent with both *Meritor* and the rape cases discussed in Part II. By emphasizing those activities, the court in effect blamed Burns for the harassment that befell her. The court interpreted *Meritor's* endorsement of the admissibility of a victim's sexually provocative speech to include speech that occurred both inside and outside of the work setting, even when that speech was directed towards the general public and not towards any particular person. Using this reasoning, a woman who appears nude in a magazine or a film, would probably never be able to prevail in a rape case or sexual harassment suit.

A court applying the reasonable woman test, however, probably would have argued that within the workplace setting, Burns had a reasonable expectation that she would not be harassed, notwithstanding her appearance in the magazine. This view is based on a distinction that is made between what happens in the workplace and what happens outside of the workplace.

In *Jacksonville Shipyards*, for instance, testimony was given by one expert witness who stated that the average female would not be offended by pornography in the workplace. However, the court discounted this testimony because it was based on a study of women who viewed pornography at their leisure in a relaxed atmosphere, and not in a job setting.[189] The court explained that "the effect of pornography on workplace equality is obvious. . . . [It] communicates a message about the way [a manager] views women, a view strikingly at odds with the way women wish to be viewed *in the workplace*."[190]

In this case, Burns' desire to come to work and simply do her job was never questioned by the district court. The court also never attempted to ascertain what her reasons were for appearing in the magazine and whether or not she hoped that her photo would invite sexual overtures from her coworkers or Oslac. In fact, the district court admitted that Burns did not welcome Oslac's overtures, either before or after Oslac learned about the magazine photo.[191] Reviewing these facts, the court in *Jacksonville Shipyards* might have concluded that Burns never intended to use her magazine photo to invite propositions from any particular

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188. *Id.* at 562-63.

189. Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486, 1509 (N.D. Fla. 1991).

190. *Id.* at 1526 (emphasis added).

191. *Burns*, 955 F.2d at 564.

coworker or Oslac, that such overtures were therefore an unreasonable interference with her job-related activities.

Judge Keith in *Rabidue* probably would have also supported this conclusion. He believed that even pornography industry employees should be entitled to work in harassment-free job settings. As long as "nudity, sexually explicit language or even simulated sex [are] inherent aspects of . . . what is required professionally,"[192] he said, employees should not be able to object to it. However, the moment that such behavior is directed at a particular employee for non-job related reasons, that employee should be entitled to Title VII protection, he said.[193]

The district court in *Burns* also failed to acknowledge that the lewd gestures and pornographic material exhibited by Oslac *before* the news leaked about the magazine photo were severe or pervasive enough to constitute sexual harassment under Title VII.[194] By minimizing the impropriety of Oslac's conduct and the impact that his behavior may have had on Burns, the court failed to look at the power differential that existed between Burns and Oslac.

Oslac was the owner of the company, a person over whom Burns had little or no power. As has been mentioned in the above discussion on the *Flagship* and *Sears* cases, a court applying the reasonable woman test probably would have decided that, for Burns, the power differential transformed what might have been simply annoying conduct on the outside into threatening and demeaning conduct at work.

As the above discussion indicates, Burns probably would have won her sexual harassment claim if her claim had been subjected to the reasonable woman test.[195]

F. How the Reasonable Woman Test Will Affect Future Cases

The chart on the following page shows some of the contrasting assumptions that have been articulated by judges who use the reasonable person test and judges who use the reasonable woman test. At their extremes, the two tests are virtual mirror images of one another. As the chart indicates, the reasonable woman test breaks with tradition by taking an almost completely different view of the way in which sexually charged behavior affects women at work. The test allows the victim, not the

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192. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting).

193. *Id.*

194. *Burns*, 955 F.2d at 564-65.

195. In fact, the court of appeals reversed and remanded the district court decision because it felt that Oslac's conduct was sufficiently severe to have created an abusive work environment. *Id.* at 566.

harasser, to play the chief role in evaluating whether or not behavior is offensive in a given case. As a result, the reasonable woman test has the potential to drastically change the way in which sexual harassment cases are decided in the future.

SOME CONTRASTING ASSUMPTIONS

THE REASONABLE PERSON TEST	vs.	THE REASONABLE WOMAN TEST
1. Harassment (i.e. pornography and vulgar comments) should be tolerated because it is prevalent in the society at large.[196]		1. Women who object to pornography can avoid or protest it in society, but they are less able to do so in the workplace because of the unequal power relation- ship that exists between them and their male employers.[197]
2. A victim who is silent or who takes too long to report her harassment is not credible.[198]		2. Because harassment victims often fear that no action will be taken if they complain, the absence of complaints does not mean that harassment did not take place.[199]
3. A victim assumes the risk of her harassment because she chooses to work in a company where harassment takes place.[200]		3. A work environment that contains sexually offensive behavior does not excuse nor endorse that behavior.[201]
4. Isolated incidents of harassment are not pervasive enough to constitute actionable harassment.[202]		4. Harassment can be actionable even if it occurs infrequently, when the qualitative nature of the harassment is egregious.[203]
5. It is acceptable to ask questions about a victim's sex life or sexual fantasies to determine if she welcomed her harassment.[204]		5. A victim does not relinquish her Title VII rights because of the private and consensual sexual activities that she engages in.[205]
6. It is appropriate to admit evidence about a victim's speech or dress because this may indicate that she welcomed her harassment.[206]		6. A victim's use of profane language may simply be a part of her efforts to fit in to the work environment and is not proof that she welcomed her harassment.[207]

196. *Rabidue*, 805 F.2d at 622.

197. *Id.* at 627 (Keith, J., dissenting). *See also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (N.D. Fla. 1991).

198. *See* Monroe-Lord v. Hytche, 668 F. Supp. 979, 984 (D. Md. 1987) (The court found it difficult to believe that the plaintiff, a university professor, would have suffered "repeated incidents of sexual harassment over a seven-year period and neither tell anyone

For instance, there is a strong presumption that supervisor harassment automatically harms the victim because supervisors have the ability to sabotage the present and future job prospects of their employees. This might even apply to cases in which a supervisor propositions an employee only once. A similar presumption would also apply to coworker harassment if it takes place more than once and the nature of the harassment is particularly egregious, or if the employer has reason to know about it.[208] However, victims should be cautioned that they may be called upon to cite sociological data to counter accusations that they have overreacted or exaggerated the extent to which they were negatively affected by the conduct under review.

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about them or report them to university officials."); Benton v. Kroger Co., 640 F. Supp. 1317, 1321 (S.D. Tex. 1986) (The court questioned the plaintiff's credibility in part because she had several opportunities to report the alleged harassment, but never did so.).

199. *Jacksonville Shipyards*, 760 F. Supp. at 1506.

200. *Rabidue*, 805 F.2d at 620.

201. *Id.* at 626 (Keith, J., dissenting). *See also Jacksonville Shipyards*, 760 F. Supp. at 1526 ("A pre-existing atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality that a sign declaring 'Men Only.'").

202. *Rabidue*, 805 F.2d at 620. *See also* Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) (Jones, J., dissenting) (Commenting on plaintiff's claims that she was touched, made the object of sexually suggestive comments, and subjected to pornographic graffiti, Judge Jones noted that because the touching incidents "were spaced well apart chronologically . . . [t]here [was] no pattern, conspiracy or consistency to the offensive physical incidents.").

203. *See* Watts v. New York City Police Dept., 724 F. Supp. 99, 105 (S.D.N.Y. 1989) (When a female police officer was sexually assaulted two times within a three day period, the court said "conduct less pervasive, but more offensive in form and effect, than slurs and epithets can so poison a working environment as to render it abusive. Physical assaults of a sexual nature obviously constitute incidents that tend to satisfy this criterion of severity.").

204. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68-69 (1986). *See also* Walker v. Sullair Corp., 736 F. Supp. 94, 98 (W.D.N.C. 1990) (In rejecting the plaintiff's hostile environment claim, the court noted that she had been sexually involved previously with other company employees and had discussed her sex life with coworkers as well.).

205. Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983).

206. *Meritor*, 477 U.S. at 68-69.

207. *See* Morris v. American Nat. Can Corp., 730 F. Supp. 1489, 1495 (E.D. Mo. 1989) (The "[p]laintiff's use of profane language . . . could be part of plaintiff's efforts to fit in to the environment at hand. Such conduct, however, does not justify the harassing conduct plaintiff then endured."). *See also* David Holtzman and Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 St. Louis U. L.J. 239, 261 (1987) ("Contemporaneous statements that sexual advances are welcome or unwelcome are obviously more objective expressions than are accounts of dreams or idle discussions about sex.").

208. *See* Abrams, *supra* note 16, at 1212.

There is also a clear presumption that pornography has an unreasonably negative impact on women and that it should not be tolerated in the workplace. This is especially true for pornography that depicts nude or partially nude women in sexually demeaning poses. As the court in *Jacksonville Shipyards* observed, this type of pornography causes men to overly sexualize their interactions with women coworkers and to treat those coworkers as sex objects.[209] It is not likely, however, that this will lead to an all out ban on photographic displays of women in the workplace. Less sexually-overt depictions of women, like those found in the Sports Illustrated Swimsuit edition, probably would still be allowed by the courts.[210]

Even under the reasonable woman test, some conduct of a sexual nature would still be allowed in the workplace. This will be especially true for conduct that is welcomed by female employees. Under the reasonable woman test, however, evidence about the victim's sexual life or about her failure to report the harassment, may not be enough to prove welcomeness. A defendant may instead have to produce evidence that the victim, either through words or in writing, indicated that she was open to her alleged harasser's overtures.

Finally, courts will also not view sexually charged comments made by homosexual men to be sufficiently threatening to women to warrant the unique protection that Title VII affords. As the district court in *Fair* said, such comments, while they may be in poor taste, do not sufficiently threaten female employees.[211] However, using a more contemporary version of the reasonable man test, heterosexual or homosexual men may have a Title VII cause of action for this type of harassment.

VI. Conclusion

Since the Clarence Thomas hearings, the EEOC has estimated that it has received fifty percent more sexual harassment claims in 1992 than it did last year during the same period.[212] Clearly, sexual harassment is

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209. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1526 (M.D. Fla. 1991).

210. Questions have also been raised about the constitutionality of banning all pornography in the workplace. Some groups, like the American Civil Liberties Union, feel that such a ban violates employee First Amendment free speech rights, especially when women are not directly exposed to the pornography (i.e. when it is in someone's desk or in their locker). The 11th Circuit Court of Appeals will be reviewing this issue on appeal in the *Jacksonville Shipyards* case. *See* Arthur S. Hayes, *Pinup Cases Splits Free Speech Activists*, Wall St. J., April 29, 1992, at B12.

211. Fair v. Guiding Eyes for the Blind, 742 F. Supp. 151, 156 (S.D.N.Y. 1990).

212. Marilyn Adams, *Sex Harassment Charges Up Sharply*, Boston Globe, July 13, 1992, at 3.

a serious problem for both employers and employees alike. From both an ethical and an economic perspective, managers should attempt to eliminate it from the workplace. The negative emotional impact, and the high rate of absenteeism and poor job performance caused by harassment, are well-documented.[213] This, combined with the fact that the revisions to the Civil Rights Act of 1866 gives victims of intentional sex discrimination the right to sue for up to $300,000 in punitive damages,[214] makes it imperative that managers develop strategies to deal with this problem.

Companies should not wait until they are the objects of bitter and protracted litigation before they begin to implement policies to deal with sexual harassment. Many legal experts believe that the most effective way for companies to combat sexual harassment is to adopt clearly articulated policies that both condemn harassment and educate employees about its nature and effects.[215] Some states are even considering adopting laws that require companies to educate their employees about sexual harassment.[216] However, policies that pay lip service to this goal, while failing genuinely to implement it, will not protect companies from liability.

Companies can show that they are making good-faith efforts to address sexual harassment by establishing programs that consist of the following:[217]

(1) *A Policy Statement.* Companies should make a general verbal and written announcement to all employees that sexual harassment is illegal and will not be tolerated. The policy statement should include the following elements:

(a) *Specific Examples.* Since men and women often experience the same types of behavior from very different perspectives, it is important for companies to give specific examples of the types of conduct that will not be tolerated. For instance, the *Jacksonville Shipyards* court required

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213. 1988 MERIT STUDY, *supra* note 2, at 39-42 (The study estimated that 36,647 victims left their jobs, $26.1 million worth of sick leave was used to cope with harassment, and the value of worker productivity declined by $128 million as a result of harassment.).

214. 42 U.S.C. § 1981(a) and (b) (Supp. II 1992).

215. *See* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1534 (M.D. Fla. 1991). *See generally* Abrams, *supra* note 16, at 1216. Abrams says that legal decisions do not "organize or educate employees to produce . . . necessary changes in conduct." *Id.* She, therefore, recommends that companies implement compliance programs that provide guidelines for employees that describe unacceptable conduct. She also suggests that supervisors be held responsible for monitoring the effectiveness of those guidelines on a periodic basis. *Id.* at 1217-19.

216. *See* Kimberly Blanton, *Mass. Sexual Harassment Bill Filed*, BOSTON GLOBE, Dec. 10, 1991, at 39.

217. All of the suggestions are taken from the harassment policy mandated by the court in Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1541-46 (M.D. Fla. 1991).

the employer to issue a policy statement that described unwanted sexual advances as "jokes or comments about a person's sexuality or sexual experience directed at or made in the presence of any employee who indicates or has indicated in any way that such conduct in his or her presence is unwelcome."[218] Kathryn Abrams also suggests that companies use readings, films and simulations to demonstrate potentially offensive situations.[219]

(b) *A Description of Penalties.* The policy statement should also describe penalties that will be applied to those who harass other employees. Depending on the severity of the harassment, penalties can range from formal reprimands and probationary periods to dismissal.

(c) *Grievance Procedures.* The policy statement should describe a grievance procedure that makes it clear how investigations will be carried out and to whom employees can complain. The grievance procedure should also note that within the bounds of the investigatory process, confidentiality will be observed.

(2) *Ongoing Educational Programs.* In addition to issuing a policy statement, companies should establish ongoing educational programs that provide general orientation seminars for new employees, and periodic safety meetings for existing employees.

The above suggestions are not meant to be an exhaustive study of the type of sexual harassment programs and policies that companies should adopt. Any company, however, that genuinely decides to adopt measures of this kind will be well on its way to bridging the wide and costly perception gap that exists between the sexes. It is only through the implementation of such measures that sexual harassment will be eliminated in the workplace to any significant degree.

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218. *Id.* at 1543.

219. *See* Abrams, *supra* note 16, at 1219.

The Teaching of Legal Classics*

CHRISTIAN C. DAY**

"I teach them correct principles and they govern themselves."[1]

INTRODUCTION

The study of legal classics invites participants to consider profound concepts that have shaped our society and its intellectual framework.[2] The course *Legal Classics* offers undergraduate legal studies students, law students, and graduate students of literature or history the opportunity to read and reflect upon some of the great works of Western

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* This Article is dedicated to the late L.F.E. Goldie, Professor Emeritus at Syracuse University College of Law, and to the late Alan Bloom, Professor at the University of Chicago.

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Special thanks are in order to Ms. Ann M. Kochan, B.S., 1978, Syracuse University, M.B.A., 1982, Syracuse University, who, once again, has provided sparkling editorial expertise, replaced prolixity with precision, and imposed clarity and order. Thanks also to Research Assistants, Joanne F. Weil, J.D., 1991, Syracuse University College of Law, and Neil J. Weidner, J.D., 1991, Syracuse University College of Law, who aided in the preparation of the undergraduate materials.

1. Joseph Smith, Jr., one of the founders of the Church of Jesus Christ of the Latter-day Saints (the Mormon faith), *as told by* John Taylor, THE MILLENIAL STAR, Nov. 1851, vol. 13, at 339, *available at* Brigham Young University Library, Provo, Utah; *also found in* THE WISDOM OF JOSEPH SMITH 20 (compiled by D. Cannon, 1983).

2. Although this Article was written initially for law teachers (inside and outside of law schools), it should be of value to teachers of literature, English, the classics, government, history, economics, and sociology. Lawyers and lay readers also may wish to become reacquainted with these great minds, or to meet them for the first time. Classical liberals will be welcomed home by some writers, as will true conservatives of a Burkean or Hamiltonian bent. Critical legal studies proponents (Crits) will have the opportunity to meet, and perhaps know and even love, their "enemy."

legal thought.[3] This Article maintains that the canons are worthy of teaching in their own right, and describes the creation and teaching of a course on some of the important classics of Western legal thought at Syracuse University College of Law.[4]

At the outset, we tried an experiment in American legal education. The canons of Western legal and political thought do not seem to be taught with any regularity anywhere in American law curricula. The faculty who created this course concluded that it was inappropriate to assume that law students have a common intellectual foundation or background. It is folly to assume that contemporary students are as well-educated or well-read as the lawyer of yesteryear.[5] Such American

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3. The title "Legal Classics" undoubtedly was inspired by the Legal Classics Library, a collection sold by Gryphon Editions, Inc., Birmingham, Alabama. For a number of years, I have collected these handsomely bound facsimile editions of great legal works. I also have been attracted to classic political and legal documents, such as the writings of Aristotle.

4. It is not my intention to slight the contributions of non-Westerners to legal thought and philosophy. The course models proposed here are based upon materials with which I have greater familiarity. As will be seen, their development followed the path of least resistance to create a new offering for Syracuse University College of Law, drawing upon the talents and interests of a number of faculty members, and appealing to the broadest segment of scholarly law students—hence, the decision to create a "Western" legal classics course. This course structure could be adapted easily to study great legal works of other cultures or to a comparative literature course, but teaching the Western classics first is strongly urged.

5. This phenomenon is not restricted to law colleges. We merely inherit the poorly educated and poorly equipped students from our colleges and universities. L. Pearce Williams, Senior Professor at Cornell University, observed recently in an open letter to new students:

> The assumption of the faculty [in abolishing requirements pertaining to Western Civilization] was that all of you were thoroughly saturated with the values of Western Civilization. You had read and appreciated the plays of the Hellenes; understood Aristole's philosophy of morals, politics and nature; had discussed the political theories of Thomas Aquinas, Machiavelli, Harrington, Hobbes, Locke, Robespierre, Marx, Jefferson, Hitler, Stalin and Dworkin; found meaning in the words of Moses, Jesus, Luther and Calvin; thrilled at the science of Newton, Lavoisier, Faraday, Maxwell, Planck and Heisenberg; appreciated the social theories of Rousseau, Sorokin and Parsons; and, finally, had been moved by Sophocles, Chaucer, Montaigne, Shakespeare, Bryon, Conrad and Mailer. There was, therefore, no reason to require courses from you that would introduce you to these familiar thinkers. There is, to underline my point, no *Western Civilization requirement*, even though you will move and live throughout your lives in that intellectual environment, *knowledge of which leads to empowerment*

lawyers as Joseph Story, Daniel Webster, John W. Davis, and William O. Douglas were well-grounded in their culture and intellectual history.[6] Before teaching the course, all involved had concluded independently that the moral issues espoused, and the poetry of language found in the selections we offered, would enhance the lives of our students and make them better citizens.

The teaching of Legal Classics creates a marketplace of ideas. An informal survey of present literature and law college catalogues reveals that the literature contained in *Legal Classics* is *not* typically taught at law schools. The ideas and authors in our curriculum of *Legal Classics*, however, will expose both students and faculty to the marketplace of ideas, where ideas are tested and contested. Although many of the contemporary critical legal studies proponents (Crits), feminists, Marxists, and others would dismiss Edmond Burke, William Blackstone, or Aristotle as irrelevant and dangerous, we contend that they are worthy of study. Indeed, Karl Marx, Georg Wilhelm Hegel, and Roberto Unger (whom we have included) most certainly deserve attention.[7] Marxism is in retreat, except in academia. Yet, even if Marxism were in retreat everywhere, it still would be entitled to intelligent study, as Marx was important for his times and ours.[8] If Marx should be studied, then so too should Burke, Blackstone, and Alexander Hamilton, among others currently neglected—and not merely because Western democracy appears to be in ascendancy.

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and upward mobility.

L. Pearce Williams, *Campus Watch: Focus: The New Multiculturalism Requirement—A Guide for the Perplexed*, CORNELL AM., Aug. 1992, at 20 (emphasis added).

6. Other great Americans likewise have understood and loved their culture. Although neither Presidents Eisenhower nor Truman were lawyers, both were very well-read citizens. They knew Shakespeare, the Bible, and American and world history. *See generally*, STEPHEN AMBROSE, EISENHOWER: SOLDIER, GENERAL OF THE ARMY, PRESIDENT-ELECT 1890-1952, at 31-33, 38-55 (1983); DAVID MCCULLOUGH, TRUMAN, at 42-43, 44-45, 48, 52, 54, 58-62, 64, 65 (1991).

They used their knowledge to enhance their own lives; their broad-based and profound love of learning enabled them to make terrible decisions with confidence and humility. Lawyers, too, should have the intellectual depth and moral background to advance the concerns of their clients and causes within a principled framework.

7. Some authors were omitted because of time constraints and faculty preferences, but they *all* are worthy of serious reflection and study.

8. His ideas in play during the Russian Revolution and the breakup of the Soviet Empire certainly are significant. Marx's economic analysis and thought offers explanation for much of human behavior.

The great Western legal and political minds should be studied and appreciated for the same reasons that make Chinese art and Chinese history important. It is not that I prefer the present system of Chinese communism or wish the return of the dynasties; but the well-informed citizen, and certainly, the well-educated scholar, cannot neglect landmark Chinese achievements. China has created governmental structures worthy of attention which have lasted five millennia. Eastern art, although very different from that of the West, has influenced our Western culture.[9] Great works of the East stand in their own right and are important as parts of the heritage of humanity.

Legal Classics invites just such enlightenment, observation, and comparison in its forum. The marketplace of ideas is truly inclusive and requires intellectual triumphs from all cultures in its canons.

Legal Classics sets the foundation for a balanced appreciation of diversity. Much of the attack on the canon is the ill-founded concept that diversity and an appreciation of diverse cultures and ideas is somehow strengthened by ignoring or deriding Western culture; but, American students and citizens cannot understand true diversity without understanding our own culture—the common heritage of the West. Western civilization itself is valid.

History is not inevitable.[10] The Western democracies' apparent triumph was not preordained.[11] There are few historic examples of democratic or republican government, and all come from the West.[12] Our founders were aware of this tragic history. We who know little history may soon forget this truth and suffer surely for our ignorance. Now

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9. For example, Eastern art had a great influence on the works of such diverse talents as Frank Lloyd Wright and James Whistler. Even if it had not, its beauty and the minds which produced it earn our respect and recognition.

10. This is true despite Karl Marx's pronouncements on the inevitability of the triumph of communism.

11. Hitler almost destroyed European civilization. The Soviet state was unsuccessful in its attempt to destroy freedom because it failed its people, and the West resisted at great cost—Korea, the Berlin Blockade, Kennedy's adroit handling of the Cuban Missile Crisis, the Afghan War, and the Reagan arms buildup all played their parts.

The teach-ins and good feelings of the 1960s did not liberate the Communist bloc. Western technology, culture, and economic freedom pointed out the abject failures of the Communist totalitarian state. Military strength (and a willingness to do battle) also were fundamental in unseating communism. Ultimately, the emperor had no clothes!

12. *See* DONALD KAGAN, PERICLES OF ATHENS AND THE BIRTH OF DEMOCRACY Introduction (1991).

that the world seems to be embracing liberal democracy and the market economy, it is doubly important to understand our roots.

Western culture can be embraced as good and other cultures still can be respected. I admire the Chinese culture. I appreciate Chinese painting and sculpture. I enjoy learning about China's history. I admire the people. I respect what China has done for five millennia—it has been a world power by any definition and one of the world's great cultures. While being the most populous state in the world throughout its history, it has managed to have a stable society and feed its people (most of the time). But China has accomplished this at great expense. The bureaucracies, which have sustained China though the ages, also have stifled freedom and science.[13] China's ethnocentricity and culture have closed its peoples' minds and thwarted scientific investigation.[14]

The West ultimately may follow like the Chinese emperors if its self-imposed ignorance and intellectual smugness cause it to abandon research, logic, proof of argument, and scientific enterprises such as space exploration. Domestic problems will always exist.[15] They, quite

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13. *Cf.* DANIEL J. BOORSTIN, THE DISCOVERORS 60, 74-75, 333, 562 (1983).

14. It is not by accident that China is referred to as the Middle Kingdom and that the Chinese, like many other peoples, are xenophobic and ethnocentric. This has had its costs.

For example, in the 15th century, Chinese maritime technology was equal to, or better than, that of the West. Chinese fleets roamed the Indian Ocean and followed the East African coastline. In contrast to the tiny fleets of Columbus, Magellan, and Vasco da Gama, the Chinese emperors launched huge fleets of up to 27,500 officers and men. These magnificent fleets conducted a two-year expedition which established diplomatic relations or tributary states with 20 realms from Java to Mecca to the southern coast of East Africa. Chinese interests were not mercantile or military, as were those of the Western states. Rather, the Chinese sought to impress other peoples with their splendor.

The Chinese eventually turned back, not because they could not afford the enterprise, but because they decided that the rest of the world was not worth exploring or taking. *Id.* at 186, 190-96, 199-200.

The Chinese state did not encourage the spirit of discovery. Had it, the New World might have been "discovered" and colonized by the Chinese. After the Chinese turned their backs on the world, their technology declined. *Id.* Within centuries, "barbarians" from the West subdued the superior Chinese, and China is still recovering from that encounter.

15. America has great problems such as poverty, racial discrimination, and inadequate health care. But none of these poses as grave a threat to our nation as Hitler, thermonuclear war, slavery, or the attempt to dissolve the Union. A nation capable of surviving those soul-testing struggles and landing on the moon should be able to put its present house in order.

appropriately, demand our attention and resources. When a people becomes too focused upon itself, it loses its spirit, vitality, and perspective. We cannot afford that selfish indulgence. A broad and deep grounding in our civilization will help maintain our focus on progress and ordered liberty.

Our final assumption was that a familiarity with the canon is desirable for lawyers. We believed that when students read the texts, understood the historic context of the writings, and intelligently and with intellectual integrity and vigor challenged the theses, the discipline attained would promote clear thinking and good habits of citizenship. Lawyers and citizens exposed to these thinkers are more able to articulate positions and expose fallacies in the search for truth. They will not assume the rectitude of their positions, nor will they blithely permit error to triumph.[16]

The canon represents a standard and argues for the best that humanity can be. The Western thinkers have their faults and were presented that way; but the canon was there in all of its comprehensible and often eloquent glory to challenge and be challenged.[17]

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16. *Cf.* William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988). Professor Wiecek has argued with force that the Supreme Court, through ignorance and deliberate misdirection, ignored history in a number of important matters. Three things must be stated unequivocally: First, to employ history properly, it must be learned; second, the truth is crucial; and, third, it is immoral to falsify history for most political ends.

However, this author does accept the need for great myths. In the telling of the founding of states, liberties are often taken. For example, the Athenians taught that their progenitors sprang from the earth. This allowed the Athenians to imagine that they were fundamentally different from their Attican neighbors—not bound or limited by others' traditions and beliefs—and to capitalize ultimately upon their distinctness. Similarly, the English with their Glorious Revolution and Magna Carta, and we Americans with our break from Europe, have nurtured myths of distinction from which freedoms have sprung.

Athens was different. Until the modern era, it was one of the few democratic states. *See generally* KAGAN, *supra* note 12. In Greece, only its colonies adopted democracy; its major rivals, such as Sparta and the Persian Empire, were militaristic states. Perhaps Athens' myths had something to do with its noble heritage.

Athens, our American myths about the Revolution, and the like notwithstanding, it is important for citizens to understand their history and character. It is evil for politicians, and would-be statesmen, to distort history and lie for banal purposes.

17. The great writers we presented do have their failings. For example, we studied Thomas Jefferson, and some might have taken him to task for being unenlightened and wrong about slavery. He was a product of his time. His thoughts, notwithstanding his

The challenge of the canon is a necessary and effective educational tool. The canon uniquely provides a standard to judge political, legal, moral, and economic conduct.[18] Standards exist to be challenged—but they make challengers and advocates accountable to a measurable ideal which can be examined and tested.[19] This is a marked departure from much of the modern subjective orthodoxy. The argument for the canon asserts that some ideas and ideals are more worthy than others. This assertion is not made lightly. It should only arise after the canon has been subjected to rigorous challenge—intellectual and practical.

Western civilization and ideals are being embraced as totalitarian and former authoritarian societies throw off their yokes of oppression. Indeed, although now much maligned in many quarters,[20] Western ideals and methods have given rise to and nurtured the present debates. Western ideals engender enlightenment and, although far from perfect, these ideals provide an open, accessible framework and support for progress. However, their very openness permits challenges. Proponents of classical Western liberalism must actively insist upon open, vigorous, and intellectually honest debate.

It is self-evident that good and informed citizenship is promoted when a people knows and reveres its culture.[21] If *Federalist* No. 10[22]

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imperfections by the modern standards, hold up well and have been seldom matched for their beauty, eloquence, or power. The same could be said of many of the authors on the list we studied. Reflection on context (both past and present) proved stimulating to both faculty and students.

18. Adam Smith's writings on the market and moral education provide a point of departure for all contemporary debates on the role of economics and law. *See generally* ROBIN P. MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT (1991).

19. This dialogue may remind some readers of the ideal Socratic method many hope to employ in the classroom search for truth. That Socrates did it better does not stop us from trying.

20. Many Crits, radical feminists, and Marxists found in the groves of academe have little respect for classic Western intellectual thought. Yet, it is classic liberalism which tolerates and encourages informed dissent.

21. Our American canon was very selective—much was left out due to time constraints—*e.g.*, John C. Calhoun, Chancellor Kent, the Lincoln-Douglas debates, the Gettysburg Address, and the writings of Cardozo and Brandeis. We believe that if students are exposed to the bare minimum of our curriculum and methodology, they will be in a position to further investigate and learn.

22. THE FEDERALIST (Alexander Hamilton, John Jay, and James Madison) (1787-88); THE FEDERALIST No. 10, at 56-65 (James Madison) (Jacob E. Cook ed., 1961).

were known and understood, Americans would comprehend how far the nation has departed from James Madison's great republic experiment. His factions were cabined by the great state in which geography and competing interests neutralized the factions' mischief.

Now, our special-interest politics and single-issue politics paralyze the government and make a mockery of representative government. Alexander Hamilton and James Madison could not have imagined political action committees (PACs) from Massachusetts buying southern representatives, or southern planters influencing the elections in Philadelphia, Boston, or New York. Madison's system of checks and balances and *responsible* government neutralized the raw and vicious power of factions—they were not intended to result in perpetual divided government. As a nation, we have allowed, both wittingly and unwittingly, our representative form of government to deteriorate and become crippled.[23]

Only when we use Madison as a standard and look to our history can we begin to think about principled reform. Madison was essentially correct. We have so tinkered with the system, however, that we have allowed special interests to emasculate the political process while dominating the state houses and the Congress. If we Americans understood our constitutional roots as the Framers did, at least we could begin a moral dialogue to right the ship of state and prevent it from foundering. Without standards and judgment, we will continue to make great mistakes.

In *Legal Classics*, major emphasis was placed upon reading the texts as fresh, living works.[24] The course positioned the authors and their

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23. The American people apparently want a Congress that will spend without abatement and a President who will wield an unprincipled veto. They do not appear to want to discuss the hemorrhaging of the national economy or the mortgaging of their children's and grandchildren's futures.

Although we, as a people, may have achieved a government worthy of ourselves, this author certainly hopes and believes that the rational, general principles espoused by many of the authors, and the good habits and discipline brought about by studying these great thinkers, may educate the nation, its leaders, and voters.

24. What do these great minds say to us? What does Lincoln say? After all, he was a product of his time and would have deferred the battle over the evils of slavery if it would have avoided disunion. He was not enlightened by the standards of our benevolent day; yet, he was principled. He made great and terrible decisions based upon his appreciation of morality and civilization. His body of work shows a disciplined,

writings in their own times and also in the context of general legal thought. The objective was to give students first-hand experience with great thinkers grappling with such issues as order, justice, the effect of legislation, who is the final judge,[25] succession of governments, rights, economic development, and more.

Words are terribly important.[26] I agree with the Crits and feminists. Naming is important and we, as lawyers and educated citizens, must understand the grave impact of words. It is because words and lawyers' use of them are so attractive, fraught with meanings (conscious and subliminal), and powerful, that we wordsmiths must be able to appreciate their power and purpose.

Legal Classics exposes students to good writing. We dared to hope that this exposure would engender better writing. Elegant, unencumbered, and lean writing, such as we commended to our students, is readily susceptible to checks and challenges.[27]

These writers provide a standard for ideas and good expression. There is a sheer beauty to the language we have chosen deliberately. Compare, for example, Edmund Burke's thoughts on ordered liberty[28]

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principled mind whose thoughts and deeds transcend the centuries.

Although I do not subscribe to the ideas of Karl Marx, he was a great thinker who still speaks to us, and will for generations if those future generations are liberal enough to accept a broad foundation of knowledge and are willing to challenge those very stones after having studied the principles of engineering.

25. For a contemporary article on the issue of the last judge that occupied Blackstone, the Founding Fathers, and others, see John Phillip Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. Rev. 963 (1989).

26. The Gettysburg Address, Washington's Farewell Address, and the Declaration of Independence are three American texts of supreme importance, yet they are seldom studied today. Anyone seeking to inspire warriors or political action must read Henry V's speech on the eve of Agincourt by William Shakespeare. William Shakespeare, The Life of Henry the Fifth act 4, sc. 3, lines 18-67 (R.J. Dorius ed., Yale University Press 1955). The paucity of our public language and debate shows that great literature and rhetoric is no longer part of the canon.

27. Unlike much modern scholarly prose, or the language of obfuscating bureaucrats, the writings that we presented were chosen for their clarity and grace. Undoubtedly, the authors aimed to seduce, but they were not put off by employing style or elegance as they made their points.

28. Good order is the foundation of all good things.

> . . . But what is liberty without wisdom, and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness without tuition or

and Alexander Hamilton's expounding a vigorous government[29] to almost any modern writer or politician. Certainly, styles are different. We are less eloquent with a purpose. (We don't want excellence. We don't wish to stand out or call attention to ourselves. We exalt the common man and become common.) Sometimes, we use our impoverished style because we know not better; but, often, we write to confuse and obfuscate, and seek to destroy meaning.[30]

The authors we selected generally have not fallen prey to bad writing which is unpleasant, ponderous, and dense.[31] The writers have not sought to obscure truth or manipulate. They have not spoken in jargon to make others (including those nominally literate and informed) expend great effort to learn the "tongue."[32]

> restraint. . . . To make a government requires no great prudence. Settle the seat of power; teach obedience: and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a *free government*; that is, to temper together these opposite elements of liberty and restraint in one consistent work, requires much thought, deep reflection, a sagacious, powerful, and combining mind.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 262, 263 (Dolphin Books 1961) (1790) (emphasis in original) [hereinafter REFLECTIONS ON THE REVOLUTION IN FRANCE].

29. "[T]he vigour of government is essential to the security of liberty." THE FEDERALIST No. 1, at 5 (Alexander Hamilton) (Jacob E. Cook ed., 1961). Anyone wishing to see a crisply written economic plan need only turn to Alexander Hamilton, *Report on Manufactures*, *in* 10 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1966). Compare this to the recent dissembling of both major parties' platforms, neither of which managed to produce an intelligible plan for the economy.

30. This destruction of meaning is not in the manner of James White's *When Words Lose Their Meaning*. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984). That is, meaning changes legitimately when the culture changes so much that a new era has dawned.

It is instructive that Professor White's book discusses the language of authors ranging from Homer to Thucydides to Jane Austen to Burke to the American Founders. There is not a slothful or disingenuous writer in the lot.

31. This generous generality applies to most of the authors and texts selected. To my taste, and even those of his adherents, Unger is most often obtuse and impenetrable. This *is not* desirable nor advantageous. Yet, it is another standard.

32. Much modern political, legal, and cultural criticism seems designed to exclude the novice and average reader. The language makes most readers feel stupid, ignorant, deficient, and uniformed. Ultimately, these readers and students (and often citizens in the political realm) are excluded from the "loop." Their political and cultural insecurity is intentionally inflicted by writers with a powerful agenda.

Further, indirect writing makes it difficult to pin down the author's meaning. Through misdirection and obfuscation, it becomes difficult to contest the author's position. The writers chosen in *Legal Classics* permit students and readers to hold up selected texts, writings, theories, and judicial opinions to the clear mirror of learning. There is no hiding the ball.[33]

Legal Classics develops and refines students' reasoning skills. Ultimately, a number of our law students attested that *Legal Classics* did just that. They reported that this course placed many of their other substantive courses in a theoretical framework. Although no one contended the course made sense of tax complexities, corporate reorganizations, or employment discrimination law, they indicated that the readings and discussions gave them a jurisprudential structure which enabled them to see that modern law was still grappling with eternal issues. They further indicated that *Legal Classics* helped them to set their own philosophical houses in order.

A delightful byproduct of this process was that contemporary students came away with a firmer grasp of ethics and overarching moral principles, despite the fact that many of the texts used were "ancient."[34] Another objective, which was amply satisfied for law students and should be pursued with undergraduates, was the honing of legal writing and research skills. *Legal Classics* required students to conduct detailed research on a theme or author chosen from those discussed in class.[35]

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33. The writing in our course is pleasant to read and easily accessible. That is quite deliberate. If the writing is not lean and elegant, if it is not designed to educate, then it may be used to control by obfuscation, complexity, and misdirection.

34. We started with the Talmud, proceeded through Roman law and the development of common law, and concluded with a sampling of important 20th century writers. Many students found that the international law of Pufendorf and Grotius is the bedrock of much modern thought; that Burke and Blackstone still speak to conservatives, but not to neo-conservatives; and that the Talmud, as many rabbis and Jewish lawyers have long known, is excellent training for the bar and modern legal thinkers.

35. For example, one of our students, Ms. Margaret Babb, Syracuse University College of Law, J.D. 1990, was intrigued by the French Revolution and wrote on the revolutionary themes contained in Beaumarchais's works such as *The Barber of Seville* and *The Marriage of Figaro*. Margaret Babb, Burke and Beaumarchais: Two Perspectives on the Eve of Revolution (1989) (unpublished manuscript on file with the author at Syracuse University). A year later, another student, Mr. Donald Griffith, delved deeply into the jurisprudence of Justice Story and its contribution to American legal thought. Donald Griffith, Justice Joseph Story and American Equity: An Analysis of the Commentaries on Equity Jurisprudence (1990) (unpublished manuscript on file with the author at Syracuse University).

Legal Classics gave faculty participants the opportunity to teach some of their favorite legal writers and thinkers, without taking them away from their major substantive interests, or requiring any one professor to become the expert on legal jurisprudence, philosophy, history, economics, or other specialty areas. If the course is team-taught, as it was at our law college, actual faculty commitment can be tailored to fit any college or professor needs. The commitment may be as high as regular attendance, preparation, and discussion, or as minimal as preparation for the assigned class sessions and assistance with any pertinent research proposals.

Lastly, *Legal Classics* exposed students to many different teaching styles, outlooks, and approaches, notwithstanding the common themes present in the course. Many students reported that they found this aspect of the course enlightening and beneficial. Likewise, the faculty enjoyed observing others teach, and gained insight from the observations and friendly criticisms which often followed.

I. Legal Classics for Law Students and Other Graduate Students

A. Course Creation

For a number of years, another Syracuse University faculty member, Professor William M. Wiecek, and I discussed offering some type of reading seminar in which faculty and students would explore some of the law's great writings. We had hoped to meet every other week for a couple of hours and try to interact among ourselves and with the students as much as possible. The catalyst for the creation of this course was the arrival, in 1988, of our dean, Michael H. Hoeflich, who had a strong background in legal history and an interest in legal literature as well.

Bill and I began to envision a course where participating faculty and students would be able to bring their views, expertise, and knowledge to the seminar table. We sought to have somewhere between five and seven faculty join us, which would require that each professor be responsible for two or three classes, depending upon how many expressed interest and volunteered. We decided that the faculty would be encouraged to select readings of 100 to 200 pages per class, which would yield excerpts of sufficient depth for a reasonable degree of immersion, yet

would not discourage detailed and thoughtful reading.[36] Students would have the option of a research paper or a final exam.[37]

With a nucleus of three committed professors, we discussed what areas we might wish to teach and who might be available and interested to fill in the gaps. Bill Wiecek agreed to do *The Federalist*[38] and other legal thinkers of the nineteenth century. Mike Hoeflich, a glutton for punishment in his first year as dean, graciously agreed to prepare classes on The Talmud,[39] Gaius,[40] and authors who wrote about and were influential in legal education.[41] I was interested in teaching some of the classic legal and political writers such as Aristotle and Plato, as well as eighteenth century writers such as Blackstone and Edmund Burke. Both

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36. We received pleasant surprises. In many instances, not only did the students do the assigned readings and come to class prepared, they drew heavily upon their exposure to other writers of the era or writings on the same themes. Often they read more of the assigned author, and critiques of the texts. The reading load seemed an appropriate one for the course at the graduate level. See *infra* notes 220-28 and accompanying text for the undergraduate syllabus and reading load.

37. In the two classes we have held, no students exercised the examination option. Had some opted for it, I believe that an examination could have been constructed by having each professor create a question or questions on his readings. The coordinator would then have edited the questions and perhaps combined some themes. The professors would have graded their particular questions, and the coordinator would have been responsible for compiling the results and scaling the scores. If necessary, all of the faculty could be polled on the curve, etc.

The undergraduate proposal, described in Section II, *infra*, suggests two models: a small class or seminar model that uses research papers, and a large class offering that requires two short papers and a final exam. Thematic questions, which could be used for testing purposes, are set forth in the undergraduate model.

38. THE FEDERALIST, Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 48, 49, and 51 (James Madison).

39. Dean Hoeflich made the following assignments: BACK TO THE SOURCES: READING THE CLASSIC JEWISH TEXTS 128-75 (Barry W. Holtz ed., 1984) [hereinafter BACK TO THE SOURCES]; JACOB NEUSNER, INVITATION TO THE TALMUD 87-169 (1984); ABRAHAM COHEN, EVERYMAN'S TALMUD 298-345 (1932).

40. Dean Hoeflich assigned the following: THE INSTITUTES OF GAIUS: TEXT AND TRANSLATION 20-123 (W.M. Gordon & O.F. Robinson trans., 1988) [hereinafter TRANSLATION, INSTITUTES I]; *Gaius Noster: Substructures of Western Social Thought* 619-648, *in* HISTORY, LAW AND THE HUMAN SCIENCES (Donald R. Kelley ed., 1984) [hereinafter *Gaius Noster*].

41. Daniel Mayes, Blackstone, Benjamin F. Butler, and others. *See* THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES (Michael H. Hoeflich ed., 1988) [hereinafter THE GLADSOME LIGHT OF JURISPRUDENCE].

Bill and Mike suggested that Professor Kenneth J. Pennington of the History Department at the Maxwell School of Citizenship, an expert on Roman law and canon law, be invited to participate. Ken agreed to teach classes on medieval Roman law and the development of English common law. Word of our discussions spread, and several more volunteers appeared. Professor L.F.E. Goldie volunteered to conduct classes on great writers concerned with international law. Professor Richard Schwartz offered to teach Austin, Maine, Unger, and Weber. Professor Samuel J.M. Donnelly rounded us out by agreeing to cover Holmes and Pound. In each instance, the professor who volunteered had an affinity for the texts and authors covered, and had thought about how these characters fit into the scheme of legal thought and history.

Once the faculty had indicated their interests and volunteered, the schedule and the syllabus fell neatly into place.[42] As course coordinator, administration of such a course proved to be fairly easy. Some flexibility was needed because of conferences and other faculty obligations. Beyond the schedule, each professor was responsible for selecting his readings and ordering the books (or copies), or placing the readings on library reserve. The team teaching format is ideally suited to presenting material such as legal literature, as it enables the college to include many diverse talents and interests without great burden in either faculty time or overhead.[43] The same format could be used to study texts used in

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42. Our syllabus and reading list are found *infra* in Table 1. A suggested syllabus for the one-semester, undergraduate version of the course is found *infra* in Table 3.

43. Team teaching is fairly economical. Faculty are free to concentrate their energies on one or two class sessions. The major burden lies with the course administrator, who must ensure a reasonable schedule and assignments for all concerned.

Exposure of both faculty and students to the various teaching styles and approaches to legal thought and great writing is a unique benefit of team teaching of *Legal Classics*. Most students felt that this asset was one of the highlights of the course, and often, their legal education at Syracuse. Faculty also benefit from exposure to other teachers and observing how they handle discussions and lectures.

A course such as this can be offered easily without reliance upon one or two jurisprudential experts to carry the load. For example, our instructors had very diverse teaching and research interests. Our team of instructors included a sociologist, several legal historians, an expert in canon law, a bankruptcy and commercial transactions specialist, a real estate finance/tax maven, and others, as the brief faculty biographies below indicate.

traditional law and literature courses.[44]

B. Guidelines for Teaching the Legal Classics Texts

1. The Talmud.—The Talmud is a logical starting point for a course covering basic texts of Western legal thought. The Talmud requires

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Thus, a course like this probably can be tailored to be successful at any school if there is the inclination and a modest amount of will.

Staff of Legal Classics

Christian C. Day, Professor of Law. Courses: Corporations, Real Estate Transactions and Finance, Professional Responsibility, former Moot Court Advisor. Research: Corporations, Real Estate Finance and Taxation, Foreign Policy and National Defense, Land Use and Economic Issues.

Samuel J.M. Donnelly, Professor of Law. Courses: Commercial Transactions, Creditors Rights, Jurisprudence. Research: Commercial Transactions, Bankruptcy, Jurisprudence.

L. Frederick E. Goldie, Emeritus Professor of Law. Courses: International Law and International Business Transactions. Research: Public International Law, Law of the Seas.

Michael H. Hoeflich, Dean, Professor of Law, and Professor of History. Courses: Contracts, Real Estate Finance, Legal History, Legal Literature, Taxation, Pensions. Research: Contracts, Real Estate Finance, Legal History, Legal Literature, Taxation, Pensions.

Kenneth J. Pennington, Professor of History. Courses: Roman Law, Medieval History. Research: Medieval History, Legal History, Canon Law.

Richard D. Schwartz, Ernest I. White Professor of Law, and Professor of Sociology. Courses: Law and Society, Criminal Law. Research: Law and Society, Criminal Law.

William M. Wiecek, Chester Adgate Congdon Professor of Public Law and Legislation, and Professor of History. Courses: Civil Procedure, Constitutional Law, Corporations, Legal History. Research: American Constitutional Law, Legal History, Nuclear Power.

A final benefit of exposure to the thoughts and presentations of other faculty is that an instructor can acquire the knowledge and confidence to offer *Legal Classics* as a solo instructor. The professor will have witnessed experts who have already compiled a list of readings and resources and conducted effective classroom experiences. Having collaborated with my colleagues for two academic years, I am ready to present an undergraduate version of this course for our new undergraduate Legal Studies Program, knowing that I will be able to call upon them as guest lecturers and as advisors from time-to-time.

44. I will use this bully pulpit to suggest one more variation of the traditional law and literature format. In Table 2, *infra* I have constructed a course that combines legal literature of the kind that is the focus of *Legal Classics* with such literary works as Sophocles's *Antigone* or histories of the period under consideration. Thus, students can explore legal and political theories and contrast them with issues and problems confronted in great and entertaining literature. James Boyd White's *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* would be an excellent place to shop for ideas to supplement these thoughts. *See* WHITE, *supra* note 30.

students to undertake textual studies and to focus on the continued vitality of the *text*.

Dean Hoeflich began the course by presenting the Talmud,[45] the most ancient of the texts studied, and one which has enjoyed a strong influence on both secular lawyers and religious scholars for ages.[46] Interestingly, the Talmud is not case law, nor statute, nor sacred text.

Well, what is the Talmud? "It is not in heaven."[47] The Talmud is mundane, a 2,000-year-old secular conversation which invites thought, consideration, wit, and wisdom in applying Jewish standards of the past to one's own time and place.[48] Yet, Talmud is solely text-centered, a highly revered collection of immutable conversations which contained all of the "law" that a Jew needed to operate in his society successfully, if only he could comprehend its nuances. Modern Americans hold the Constitution in similar esteem, recognizing its unchangeable contents,[49]

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45. His assignments are set forth *supra* note 39.

46. Throughout this Article, many of the observations and comments will be based upon my lecture notes and asides, which were created as I listened and learned from my colleagues and students when we studied the texts. I will not attempt to document each and every comment. However, I will provide appropriate citations to the texts we employed and references that we used to enable others develop their materials.

47. In a typical passage from Talmud, Rabbi Eliezer makes a point that is not accepted. He says that if he is not right, trees will prove it. Trees are flung. His friend and rival, Rabbi Joshua, says that any magician could do it. The river changes course. Still no proof. The hut will show him to be correct. The walls bend at 45-degree angles. God intervenes. "How dare you trouble me?," Rabbi Joshua says. "It [the answer, i.e., the Talmud] is not in heaven!" God has spoken and goes away. The Torah had been given. The body of law received. Thence onward, men must interpret the Torah and create Halacha (law). God is quiet. Men create the Talmud. *See, e.g.*, ADIN STEINSALTZ, THE ESSENTIAL TALMUD 27-28 (1976).

Somewhat parallel is our application of the Constitution. It is the basic text. We now create laws to give it life. The Talmudic conversation among men never ends. Rules for living can be interpreted in any form. The Constitution/statute analogy is not perfect, however. The Talmud's two millennia dialogue is also similar to common law dialogues amongst judges.

48. Jews are "people of the book." After the Babylonian captivity ended in 538 B.C., exiled Jews were permitted to return to Palestine. ERNEST R. TRATTNER, UNDERSTANDING THE TALMUD 3 (1955). The Babylonians sent Ezra to reestablish Jewish life. MORRIS ADLER, THE WORLD OF THE TALMUD 20 (2d ed. 1963). Ezra and his colleagues introduced the Midrash form of the Talmud. *Id.* A consequence of Ezra's efforts was a new class of interpreters and expounders to teach the Torah. These men were known as "Soferim" or "Men of the Book." *Id.* at 21-22.

49. *See, e.g.*, U.S. CONST. art. V. The Constitution of 1789 remained intact until

timeless, yet infinitely applicable to everyday questions of law and society.

Style and consistency, elegance and wit were prized among Talmud authors.[50] Their skill in dialogue not only illuminated religious and social issues—it encouraged a level of argument studied and imitated by lawyers for ages.

Talmudic guidelines suggested acceptable behavior without being codes of laws, yet they carried the weight of law. Ignorance of Talmud (or variation from it) cut one off from one's community. Talmudic law was personal,[51] not territorial, and an outcast would be a truly stateless person.[52] Consequently, Talmudic standards provided and nurtured a strong sense of community throughout many persecutions and diaspora.

Dean Hoeflich introduced the Talmud to the students by first giving a brief history of it.[53] The Talmud is rooted in 2,000 years of Jewish religious thought. The Talmud is often seen as a supplement to the Torah. It applied the Torah's basic teachings to human conditions in its own age, and offered procedures for facing the problems that challenged the Jews in new eras. Its foundations were traditionally laid by Ezra and his associates who returned from Babylonian exile to Palestine in the fifth century B.C. Through the Talmud, these rabbis brought the

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the Civil War, when state sovereignty and federalism clashed. The balance of power shifted conclusively in favor of federalism and the Civil War amendments ratified a new, stronger federal arrangement. For an excellent book on President Lincoln's use of language to fashion a new state see GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992). An excellent one-volume book on the remaking of the American state is by the historian James M. McPherson. *See* JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990).

50. Elegance and style, too, were prized by Roman lawyers.

51. Most of us in modern, secular society think of law as being territorial. That is, there is American law, the law of New York State, French law, and so on. It was not always so. Much law developing in the early Middle Ages was personal law. That is, people were obligated to follow the laws and customs of their ethnic group regardless of their place of residence. Thus, much of the Jewish law developed in the Frankish Empire was separate and apart from the law of the Franks. After the destruction of the Jewish state in 70 A.D. by the Romans, the framework of oral law and traditions provided by the Talmud permitted the Jewish community to retain its sense of identity and survive. Roman law also survived in much the same manner, despite the destruction of the Roman Empire. *See* PAUL VINOGRADOFF, ROMAN LAW IN MEDIEVAL EUROPE (1961).

52. Ostracism was a horrible penalty, as the banished Jew was cast out from his community and abandoned to the often hostile Christian society. In times of persecution it could mean death.

53. For a more detailed history of the Talmud than will be provided, see STEINSALTZ, *supra* note 47, at 3-85. *See generally* ADLER, *supra* note 48, at 16.

teachings of the Temple into the daily lives of the community.[54]

Talmudic teachings are found in two distinct layers: the *Mishnah* (or "study") and *Gemara* ("teaching" or "study"). The *Mishnah* states the rabbis' teachings. It consists of six main sections that are divided into sixty-three tractates. These tractates are divided into individual chapters, and the chapters contain paragraphs or *mishnayot*. In the third century A.D., the *Mishnah* was edited in its present form. (The *Mishnah* was extended by supplements in Palestine (350-400 A.D.) and Babylon (500-600 A.D.) when the Babylonian and Palestinian *Gemaras* were created.)[55] The *Mishnah* is a succinct summary of what the ancient sages thought about a subject and, thus, is the oldest layer of text. The *Gemara* is a later commentary and elaboration that introduces new subjects and problems. The *Gemara* also cites the thinking of later authorities.

Eventually, the Babylonian Talmud became the principal source of the European tradition. From the sixth to eleventh centuries A.D., there was little active anti-Semitism. During this period in the Middle Ages, much of Talmudic law developed in the Jewish communities in the Frankish Empire, as well as in other parts of the world, including Toledo, Khartoum, Wurm, and Mainz. However, with the coming of the Crusades, which fueled anti-Semitism, Jewish scholars began to codify the Talmud to protect the Jewish religious heritage from destruction. Printed compilations began in the fifteenth century, with one of the first editions published in Soncino, Italy. Because of persecution and expulsion from England, France, and Spain, Jewish communities were forced to flee to Eastern Europe, where the Vilna and Slavuta editions were published. These mid-eighteenth century compilations continue in importance to the present day. Indeed, the last editions of the Vilna Talmud were printed in this century, and the number of photographed editions based on the Vilna run in the hundreds.[56]

Dean Hoeflich then turned to the original text to illustrate how the Talmud is studied. He noted that the text is read like an archeological site, with the basic tract surrounded by later commentaries.[57]

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54. For example, Jews were required to adopt procedures that priests followed for consecrated food.

55. THE TALMUD: SELECTED WRITINGS 9-10 (Ben Zion Bosker trans., 1989).

56. STEINSALTZ, *supra* note 47, at 74-80.

57. *See* BACK TO THE SOURCES, *supra* note 39, at 140-141, which provides an illustration of the first page of the Tractate Berakhot. The *Mishnah,* which is the central text, is followed by the layer of *Gemara*, comments by Rashi, a leading scholar, and then, moving ever outward as the layers are revealed, by later scholars.

On the first page of *Mishnah Berakhot*,[58] was a seemingly simple issue: when do you say prayer (Shema)? Yet, the answer is one of complexity which gives rabbis a basis for formulating opinions. The text of the Talmud presumes detailed knowledge of Jewish life by the reader. To solve this question, the student must know that Shema is a required prayer. Rabbi Eliezer says that one can pray from the time the priests eat their Heave-offering until the end of the first watch. The Sages say to pray until midnight. Rabbi Gamaliel says until dawn. The *Gemara* refers the reader to the Bible. People live from morning to evening, but the Bible starts with evening. Students reconstruct the arguments by reading and reliving the actual oral arguments. Is it prayer-time when the priests eat the Heave-offering or when the poor man eats? Understood in the light of the religious practices of the people, the question now offers a universal measure which pertains to every student of the Talmud. The poor man works until the stars come out, and then eats. The emergence of the stars is a common time and *could* be the answer. Opinions of specific rabbis support solutions, yet the Talmud stimulates thought without directly answering.[59]

The "answer" is 1,000 years of opinions, somewhat similar to the precedents of judges which present possibilities to craft a new rule for the clever or sympathetic court. There is internal consistency within in the teaching of each rabbi. It is also important that the views of the question be rigorously expressed. But a final rule is not developed in the common law sense in which judges announce a rule which is accepted or, if not accepted, interpreted away. Thus, Talmudic study is always dynamic and pertinent to each Jewish scholar's life and times.

Talmudic guidelines enable each new generation to start its inquiry at the Bible and fashion standards and interpretations which speak to the present. Each subsequent interpretation modernizes. The Talmud provides for, and encourages, an ongoing debate on the text (the Talmud and the Pentateuch [the Mosaic books of the Bible]). While the system remains eternal, the debate continues, enabling students to find a way to interpret the law in accordance with everlasting truths.[60]

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58. *Id.* at 132-33.

59. It is certainly not *Gaius's Institutes* nor the "Blackletter Law" of our contemporary students where the rule is easily accessible and readily apparent.

60. Despite the terrible persecution of the Jews, the study of the Talmud was a unifying force that helped their communities to survive (notwithstanding the censorship

2. Roman Law.—

a. Gaius's Institutes

The course next proceeded to Roman law, which was taught by Dean Hoeflich and Professor Pennington.[61] Roman civilization has had a profound influence upon not only Western culture, but the culture of the whole world. Rome is recognized for its systems of engineering and warfare, but its major contribution was in its system of laws. Although much of Roman culture was derivative of the Greeks, law emerged from Rome as:

> a thoroughly scientific subject, an elaborately articulated system of principles abstracted from the detailed rules which constitute the raw material of law. . . . It was the strength of the Roman lawyers that they not only had the ability to construct and manipulate these abstractions on a scale and with a complexity previously unknown, but had also a clear sense of the needs of social and commercial life.[62]

Civil law derived from Roman law remains the basis for legal systems in such far ranging places as Sri Lanka, South Africa, and Scotland. Indeed, American water law is based upon Roman water law.

Codification and legal systems for administration of city-states and empires were not unknown in the Western world before the emergence of Roman law. Roots of Roman law may be traced to the ancient Middle East, where compilation and codification were present in Babylon by 1000 B.C. In Palestine, the Kings (or Judges of Judea) had a primary secular task of law giving and law collecting. These laws were fundamentally pragmatic and not abstract. Substantive subject matter covered

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and destruction of the Talmud by Christian authorities). Although the lack of political power denied the Jewish community sanctions to enforce laws and mores, the Jewish observation of the obligations found in the Talmud defined the community. Separation from the community for failing to adhere to the Talmudic standard was a powerful punishment. Exile from the community cut the Jew off from his people. He was indeed a stateless person with no community to return to and unable to be accepted by the Christian community without undergoing conversion. Thus, although Talmudic traditions did not have the force of positive law and the community was without civil or criminal sanctions that would be enforced by the state, the Talmud had implicit authority derived from the great social pressure exerted upon the Jewish community's members.

61. For an excellent primer on Roman law, see BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW (1962).

62. *Id.* at 1.

the concerns of a predominately agrarian society, for example, "If your ox is gored . . . then . . . ." Despite the philosophic bent of Greece, ancient Greek laws, too, were basic, "If X, then Y."

Although grounded in these relatively simplistic codes, Roman law successfully incorporated the pragmatic agrarian rules into a code of working principles with the flexibility to adapt to an increasingly diverse urban and mercantile society. After the founding of Rome in 753 B.C., commissions were sent to Athens to study Solon's law. The Romans were able to build on an extant system of law devised to regulate that agricultural society. As Rome became more complex, so did its set of laws. For example, in torts, the measure of damages was fairly sophisticated, even by our standards. If an animal was destroyed, damages were assessed at the highest market value within thirty days of the animal's death.

During the third century B.C., a new class of Roman men developed who used the law to acquire wealth and power. They realized that law could be used to maintain a governing class, and used as a political tool with great effect. For example, Cicero (106 B.C.-43 B.C.) made many of his great speeches as a defense lawyer in political trials.

Through the second and first centuries B.C., Roman law grew and developed. Lawyers were recognized as experts, and accorded respect. Advocati (advocates) such as Cicero achieved political prominence. By 50 B.C., many commentaries (books on law) existed, and Rome had a cadre of professional lawyers. As the Millennium approached and the Republic declined and died, the Empire recognized the utility of law to maintain imperial control. Having realized the value of governing through at least the appearance of constitutional and legal principles, Emperor Augustus retained the *forms* of the old Republic. But imperial control of the law was essential. To centralize power and create a monopoly over law, government lawyers wrote the law in the Trajanic-Hadrianic period (98-138 A.D.).

The classic period of Roman law flourished through the third century. Law became more complex to accommodate expanded trade and mercantile interests. The Emperor produced a body of public law for the Empire, and with it, a permanent bureaucracy to assist him. Lawyers developed specialties to deal with opinion letters, petitions, and appeals. During this period, legal education reached its height and law schools were established.[63] Gaius, Paulus, Ulpian, and Modestinus wrote both

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63. Two of the leading law schools were in Beirut and Constantinople. A five-

commentaries and books. *Institutes* were written as basic handbooks or treatises for law students.

During the fourth and fifth centuries, the Roman Empire continued to decline and began to dissolve. As barbarians overran the West, the capital was moved to Constantinople to consolidate power and salvage a portion of the Empire. Roman law in Gaul was now vastly different from Roman law in the East. Throughout the period of decline, the emperors maintained the Empire with law in the Roman classic tradition. The most famous undertaking, and rightly so, is that of Justinian, who commissioned a major codification in 529-534 A.D. His commission produced the *Pandex* or *Digest* (juristic opinion), the *Codex Justinian* (imperial laws), the *Institutes* (basic text for first year law students based upon *Gaius's Institutes* with some changes), and the *Novels* (new laws). Tribonouis's commissioners went back to *Gaius* in compiling the *Institutes*. *Gaius*, as a basic text, was written in simple and easily understood Latin. It provided well-organized coverage of substance and procedure—something the *Codex* and *Digest* sorely lacked. Gaius's greatest contribution was that he made Roman law accessible. The Roman law of his time was massive and complex. Gaius's presentation made the law broachable, and his *Institutes* became the primary vehicle for studying Roman law.

Rules, as law students and lawyers need them, were not given in the *Digests* or juristic opinions; but Gaius was the Blackletter law of his epoch. His text was a series of rules that were easy to understand and memorize.[64] Once the basic scheme was understood, more advanced law study was possible. This entree to Roman law provides the same entree today.

After the fall of Rome in the West, Roman law continued to be studied in Europe. But with time, important aspects fell by the wayside. The *Pandex* was no longer studied, and between 600 and 1100

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year curriculum was featured. During the first year, students studied *Gaius's Institutes*. Gaius was a provincial and a government lawyer. Little is known about him personally, and no accounts of his life survive. He was a teacher of unknown quality who gave the elementary law school lectures. He survives because *Justinian's Institutes* were extensively plagiarized from his treatise.

64. This may be seen in the following: "116. It remains for us to describe what persons are in bondage. 117. All children, whether male or female, who are in the power of their father can be emancipated by him . . . ." TRANSLATION: INSTITUTES I, *supra* note 40, at 79.

A.D., the *Digest* was erased and religious texts "written over" it. *Codex Justinian* was little used. Fortunately, *Justinian's Institutes* was never lost. It was studied in Pisa and Florence in the twelfth century for the same reasons that lawyers of earlier centuries had used it: accessibility, simplicity, and organization. Although *Justinian's Institutes* continued to play a role in the development of emerging European law, Gaius disappeared and remained submerged until 1816, when the historian Barthold Georg Niebuhr came across a manuscript in Verona, a text from St. Jerome which had been written over an earlier work. He told his friend Friedrich von Savigny about the palimpsest,[65] who ultimately recognized traces of Gaius from the *Justinian Institutes*.[66]

The discovery of *Gaius* permitted Savigny and others to understand and theorize about law in its historical context. Savigny and other scholars were now able to compare *Gaius* with *Justinian's Institutes* and later versions of the *Institutes*. Thus, they used *Gaius* as a benchmark to show how law evolved and changed. *Gaius's Institutes* can comprise a philosophic backbone for the belief that complex legal systems can be categorized, organized, and reduced for the beginner. Gaius's influence via *Justinian's Institutes* undoubtedly led to the format and organization of *Blackstone's Commentaries*. Consequently, even our modern categories depend upon his thinking and organization. The circle had been completed: from law school text to imperial tool, then lost, and finally found serendipitously to illuminate much of what we now understand as Roman law of the classic period.

b. Roman law in medieval Europe

After having completed the rise and fall of the Roman Empire and the Roman law of the Imperium, Professor Kenneth Pennington led the class through Roman law's survival and adaptation in the barbaric states of medieval Europe.[67] The *Codex Justinian* had survived, but had been transmuted into *epitomes*.[68] In southern France, translations of the *Codex*

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65. This is a manuscript in which the earlier writings have been overwritten and, sometimes, scratched out. Christians of the early Middle Ages often reused the velum and obliterated the underlying pagan writings. Through careful restoration, the earlier layers can be revealed and studied.

66. *See Gaius Noster*, *supra* note 40.

67. The primary text was VINOGRADOFF, *supra* note 51.

68. *Epitomes* epitomized the *Codex* and made it shorter.

Justinian weathered the collapse of Rome in the West; yet, this statutory law of the Roman Imperial system was of very little utility for the medieval jurist attempting to learn the law.

Roman codifications persisted during the sixth to eighth centuries, and *compilations* (or private codifications) came into existence. In the Germanic kingdoms, codifications of Germanic customary laws were written. These Germanic codifications not only included Germanic customs, but also incorporated some still useful aspects of Roman law. On the whole, however, the absorption and use of Roman law by the new rulers were rather limited in the early Middle Ages: society had reverted to a more primitive state; Roman law did not speak to the traditions of the invaders; and its sophisticated concepts were not readily accessible.[69]

So, what remained of Roman law? The Justinian codification had no real influence until the twelfth century. Meanwhile, Roman law influence persisted via the epitomes and Germanic codifications. The Roman law in the Germanic codifications was derived from the earlier codification of the Theodosian Code (fifth century). The *Justinian Digests* were practically unknown.[70]

Roman law tradition was in a state of steep decline until the eleventh century, when a revival occurred. Roman law was formally studied in 1075, in Bologna, which became an important center for Roman and canon law. *Digests* were required for the formal study of Roman law. Lecture notes from Inerius (1080-1125) showed that texts and glosses were in existence in Bologna.[71] Analysis of the teaching of Roman law

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69. Remember that these attempts to employ Roman law used the poorly organized *Codex* (the imperial laws). Roman law neophytes resorted to the *Institutes*, rather than wade through the *Codex*, which even experienced Roman lawyers found confusing.

70. Again, this makes sense as the *Digests* were juristic opinions, which lacked the organization and simplicity of the *Institutes*. The *Digests* spoke to men of a remote and complex time, and had little relevance to the emerging law of the Middle Ages. These medieval legal codes and codifications of customs made great sense because they rationalized the existing laws and customs. They were both useful and understandable to those involved with the law.

71. Bologna was the site of first European university, which began as a law school. Roman law was initially the province of clerics, and all students were clerics. Consequently, Roman law and canon law were studied and developed together in the university setting. The first laymen taught at the university in 1270.

An interesting aside to legal education of the Middle Ages is that medieval law professors were paid by the number of students they taught. Faculty rented the lecture

at Bologna reveals that it took about a century for the lawyers teaching the law to understand its full complexity. *Littera Bononesis* (Bolognese text) (eleventh and twelfth centuries) is a very different version of Roman law from the Justinian Code;[72] its *Digest* is divided into three parts (Justinian's had fifty).[73]

By 1140-1150, Roman law was used in some courts of law. But its influence remained distant and foreign to the minds of many medieval lawyers. Medieval concepts of the state, law, and government were primitive when compared with even the late Roman Empire. For example, *Justinian's Code* was a very sophisticated device of codification. This was an act of *public* law (as both moderns and Romans would understand the term) by the sovereign. This concept of public enactment by the sovereign would not have been envisioned by the creators of *Littera Bononesis*.

The dominant use of compilation remained private during this period. For example, Gratian (a leading clerical teacher of canon law in 1150) completed a private compilation of Roman law, yet its very compilation affected the papacy. Roman law, however, produced a procedural legacy[74]

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rooms. There was an economic incentive for finishing the material, as faculty who failed to complete the material were fined for not concluding classes in a timely manner. Bologna was also student-governed. Student government provided students considerable freedom. When they were unhappy with the quality of instruction they simply migrated. This migration produced some great ventures. Cambridge broke off from Oxford. Similarly, in America, Oberlin was founded by students who broke away from Lane Seminary in Cincinnati over the issue of abolition. As already noted, Bologna was a *corporation* of students. In contrast, Oxford and Paris were *universitates* of teachers.

72. Francesco Calasso, Medio Evo Del Dritto chs. 11 & 12 (1954).

73. *Littera Bononesis* had the following organization: (1) *Old Digest* [Books 1-24, Title III]; (2) *Infortiatium* [24]; (3) *New Digest* (which covered the rest). Roman law was printed in this format well into the Middle Ages.

Dean Hoeflich suggests for the intrepid reader the following: Max Conrat (Cohn), Geschichte der Quellen und Literatur des Römischen Rechts at 119 (1963) (information on the manuscript proper); Ernst Peter Johann Spangerberg, Einleitung in das Römisch-Justianeische Rechtsbuch: Oder Corpus Iuris Civilis Romani, 1 *et seq.* (1970) (early medieval commentaries on the text); and Calasso, *supra* note 72, at 599 (later medieval commentaries on the text).

English language sources of information include: Kenneth Pennington, Medieval Studies: An Introduction 339-40 (James M. Powell ed. 1992) and Wolfgang P. Müller, *The Recovery of Justinian Digests in the Middle Ages*, 20 Bull. of Medieval Canon L. 1 (1990).

74. One common system of canonical procedures was the system of *ordeals*. Ordeals

and, by the year 1200, anyone trained in canon law had to know Roman law.

Ultimately, the revival of Roman law was largely academic, originating in the great universities and not directly concerned with the practical application of the law in the courts. Eventually, the academic theorists began to use the practical nature of Roman law to solve legal problems of their times. Systematic commentaries were developed and applied to medieval needs. Although this gloss was often far removed from the original texts, virtually third-hand, the aspect of Roman law that was applied was a practical and sensible one which could serve a society growing more sophisticated and commercial.[75]

In the West in the fifth and sixth centuries, Roman law's influence declined as societies became more primitive and agrarian. Roman law's sophistication was unnecessary and, often, could not be comprehended.[76] It survived in the codification of Germanic customs, however, and in the study at emerging universities. Theoretical study led to rediscovery at such institutions as Bologna, and a new appreciation and application of Roman law emerged. Although this version of Roman law was often far removed in understanding and concept from the imperial law of the Roman Empire, its practicality and level of sophistication adapted nicely to the needs of the Middle Ages as Western Europe revived commerce and began building nation states.

3. The Emergence of the Common Law.—Why is English law different? This is an important and interesting question to all students of American legal history and the common law. It is also the theme of some of the major works on law such as William Blackstone's *Commentaries on the Laws of England*[77] and Oliver Wendell Holmes,

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such as trial by combat and trial by water were used to determine proof of allegations. The concept of evidence as developed by the common law or employed today was unknown. The mode of proof via the enactment of ordeals was that the ultimate decision came from God.

The growth of the early English common law, covered in the next section, demonstrates how common law developments of the jury and writ system dramatically changed the method of trials and the nature of much of Western law.

75. *See* VINOGRADOFF, *supra* note 51, at 46-47.

76. The *Codex* (imperial laws) had no application to a subsistence society where law and order had broken down.

77. William Blackstone's *Commentaries on the Laws of England* (1765) is the subject covered in Section I.B.5. *See infra* notes 96-108 and accompanying text.

Jr.'s *The Common Law*.[78] These works were investigated as part of the curriculum for *Legal Classics*. Professor Pennington, having guided the class through the Middle Ages and the development of Roman law as nation states emerged on the Continent, redirected us to a backwater of medieval Europe, England, where a very different branch of Western legal thought was being nurtured.[79]

Twelfth and thirteenth century Europe had a fairly universal culture and civilization.[80] During this period, England was much more continental than we might casually think. It was ruled by a Norman French aristocracy. Henry II, the father of English law, was also the ruler of an Anglo-Norman empire stretching from England to Aquitaine to Sicily in the Mediterranean. The language of the courts was French. Yet, from this soil emerged a distinct indigenous legal system. By the end of the twelfth century, three great developments occurred: First, the English court system evolved. Centralized royal courts of law were created that were unique to England. Second, a jury system was developed. Juries had been known since Carolingian times.[81] Henry II borrowed from Norman practices and built a very different institution. Third, the writ procedure was created which provided entree to the judicial process.

Glanvill, who wrote a nuts and bolts treatise on English law at the end of the twelfth century, provides much information about the courts.[82] The Prologue of his treatise suggests the imagery of Justinian, and the first paragraph gives a flavor of the times:

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78. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881). *See infra* Section I.B.12, notes 205-13 and accompanying text.

79. The text for this segment was R.C. VAN CAENEGEM, THE BIRTH OF ENGLISH COMMON LAW (2d ed. 1988). Interesting comparisons can be made by studying van Caenegem and contrasting him with Holmes and Vinogradoff as they trace and develop the growth of the major streams of Western law.

80. Remember that students and clerics, regardless of nationality, were educated at universities throughout Europe ranging from Paris to Bologna, to Pisa, to Cambridge, and Oxford. Roman Christianity was the dominant religion and Latin the written language of the educated.

81. In the time of Charlemagne, juries informed on freemen. Land sometimes escheated to the state on the basis of jury testimony. Charlemagne used the system to enhance state power. Although the centralized royal courts in England enhanced and centralized royal power, eventually, their procedures developed checks on such power and prerogatives.

82. THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL (Legal Classics Library ed. 1990) (1187-1189) [hereinafter GLANVILL].

> Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples; so that in time of both peace and war our glorious king may so successfully perform his office that, crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering justice for the humble and meek with the rod of equity, he may both be always victorious in wars with his enemies and also show himself continually impartial in dealing with his subjects.[83]

Glanvill's legal system was based upon customary law, which required *powerful* arguments to admit change.[84] The king is "to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed."[85] But the seed was there: Reason, which was not part of customary law, gave rise to these customary laws. Once reason was admitted, the law was subject to discourse and subsequent change through argument.[86]

Yet, in the same section of the Prologue, Glanvill quotes *The Institutes*: "'[W]hat pleases the prince has the force of law.'"[87] The will of the prince (like the will of the Roman emperors before him) had the force of law. At this time, England was not a land of laws. Legislation was not presumed. Written laws had no greater validity because they were written. *Reason* was the standard to which all legislation had to conform. Even if all law resided in the will of the prince, if it didn't conform to reason it could not be law. The thirteenth century Romanists in Bologna saw the same legal contradiction between will and reason. Ultimately, Continental Roman law opted for the will of the prince. In

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83. *Id.* at 1. Note how the language resonates the "arms and man" imagery of *The Aeneid*: "I sing of arms and the man . . ." VIRGIL, THE AENEID, Book I, 3 (L.R. Lind Trans., 1962). Roman power is linked to royal power. Arms and the law further the kingdom.

84. His customary law stretched back to the memory of man. Blackstone echoed Glanvill in WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, at 67 (Legal Classics Library ed. 1983) (1765).

85. GLANVILL, *supra* note 82, at 2.

86. Note how Holmes, Pound, and Llewellyn perceived the inherent flexibility of common law as being able to accommodate change and the times. *See infra* notes 205-18 and accompanying text.

87. GLANVILL, *supra* note 82, at 2.

England, the branching ultimately followed the reason of the legislation.

A great milestone of medieval English common law was the writ system. Writs were executive orders that may have had their origins in the Carolingian period. They were definitely used by the Anglo-Saxon monarchy before the Conquest. These executive writs were ex parte, and usually were orders for investigation (the conduct of which was an ordeal). The writs streamlined the administration of justice, provided excuse for royal intervention, and assisted the accretion of royal power.

Another factor in the growth of the common law was geography. After William the Conqueror, English kings imported the best of Norman administration and legal genius. Geography became a crucial factor in the centralization of authority. Medieval England was a small and isolated kingdom where aggressive exercise of royal power bore fruit. Glanvill and other theorists gave organization to the writ system and helped establish the common law by 1200. In contrast, Roman law theory and legislation proceeded slightly later.[88] France, a much larger entity, was not united until the end of the thirteenth century, and no common law was developed in France until late in the sixteenth century.[89]

The third distinguishing feature of the emerging common law was the substitution of the jury for the ordeal. Compurgation, a swearing to the truth, became employed in lieu of tempting God by demanding that He perform miracles to prove the truth at ordeals. Oath helpers, various people and neighbors, were called to testify of their knowledge of the litigation. Eventually, the jury employing the writ system became the judge of the facts, guided by the jurist who instructed on the law.

Hence, by 1200, the cornerstones of the common law had been set. The writ system was entrenched, royal courts administered justice, and

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88. Roman law was being rediscovered in Bologna, Pisa, and Florence in the universities in the 1100s. The theoretical framework was being created for re-implementation in the 13th and 14th centuries.

89. Although we Anglo-Americans tend to think of England as the defender of liberties and imagine an England whose royal power was held in check by the common law, much of this is myth. William the Conqueror did not want his English barons to enjoy the political power that barons on the continent then held. Henry II, the father of the common law, used it as a tool to build royal power. England had centralized royal authority at a much earlier stage than did France on the continent, where the distances were vaster and the baronial prerogatives of continental feudalism resisted the growth of royal power and the nation state. Ultimately, the tools developed in the common law and the very institutions created by the king (like the jury system) did lead to a legal system which protected liberties and thwarted absolutism. But history is rarely as neat as legend.

juries determined the truth of the issue. A distinct legal system was emerging; in part from the genius of the people, in part by chance, and in part because England was an island kingdom fortunately ruled by competent monarchs with a gift for law giving and central administration.

4. Founders of Modern International Law: Grotius, Pufendorf, and Vattel.—Toward the middle of the course, a serendipitous transition occurred when Professor Goldie taught two sessions on three of the giants of international law: Grotius, Pufendorf, and Vattel.[90] Grotius built on Roman law, and even law of the Biblical era, and yet his concepts are as vital today as they were in the early 1600s. His thoughts, and those of Pufendorf on natural law, influenced Blackstone, Locke, Kant, and other natural law thinkers. Emeric de Vattel (1714-1769) wrote after Grotius (1583-1645) and Pufendorf (1632-1694), and may have had the last, and ultimately, the most influential word on international law, as his writings preceded the state-practice analysis of the legal positivists. Thus, he would appear more modern in outlook to contemporary students and would be quite conversant with and sympathetic to the state of nature as envisioned by Thomas Hobbes.

Pufendorf thought justice was God-given to man, who through human nature had a sense of right conduct and sought a political society. In contrast, Hobbes maintained right conduct was imposed through the act of the state to protect men from total anarchy and unremitting war.

Grotius, unlike Pufendorf, invoked no authority to support his body of work. Neither emperor nor pope was needed. Legal order existed without political or philosophical sanctions. Grotius's authority in moral force was the law of nature. His insights relied on a long chain of philosophers stretching from Aristotle to the stoics to Marcus Aurelius and the scholastic, Thomas Aquinas. Unlike the churchman Aquinas,

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90. Professor Goldie assigned the following materials: L.F.E. Goldie, A Brief Introduction to Grotius, Pufendorf & Vattel (1988, rev'd 1990) (unpublished manuscript on file with the author at Syracuse University College of Law) [hereinafter Grotius, et al.]; L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors*, 32 AUSTRL. L.J. 220 (1958); SAMUEL PUFENDORF, DEJURE NATURAE ET GENTIUM LIBRO OCTO, (On the Law of Nature and Nations) iii-x, 145-53, 179-309, 825-36, 1292-1341 (James Brown Scott ed., & C.H. Oldfather & W.A. Oldfather trans., 1934) (1688); MONSIEUR (EMERIC) DE VATTEL, THE LAW OF NATIONS vii-lv, 3a-9, 13-52, 199-221, 188-91, 235-58, 346-66 (Joseph Chitty, ed., Phil., T. & J.W. Johnson & Co., 1876) (1863); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1-116, 290-371 (Legal Classics Library 1984) (1625).

who tried to reconcile reason and revelation, Grotius appealed simply to reason. Grotius studied Roman law and discerned that Rome (as a great mercantile state) used an "international law" in the administration of its empire. Aliens, who of course were not Roman citizens, did not follow Roman law. Special magistrates, the *Praeter Peregrinius* ("*peregrini*" means aliens, usually foreign traders who resided in Rome), were elected to deal with disputes between citizens and aliens. The body of these decisions became known as the "*jus gentium*" or the law of nations.[91] Eventually, "*jus naturale*" (the law of nature) became linked with *jus gentium* in the mind of Roman lawyers. *Jus naturale* provided a vehicle for "the transformation of Roman Law from a primitive, unsystemized and unarticulated system of virtually no philosophical or judicial influence or importance into the present magnificent body of principles, of the greatest scientific importance and influence."[92] Natural law again attained importance in the thirteenth century when St. Thomas Aquinas (1225-1274) attempted to synthesize Christian and Greek morality through the use of natural law.

Grotius attempted to build a moral order for the conduct of states, rather than an order based upon the will of princes or emperors. He turned to the propounded principles of conduct reinforced by the practices of states. Grotius studied the practice of states wherever he could find the record. He found inspiration in the Bible, and writings from the classic era and Roman times. His studies also included "modern practices." Critics contended that Grotius founded his thesis either upon state practice (similar to Vattel and the modern positivists) or upon an *á priori* vision of what constituted a just society. Regardless, Grotius's grappling with the great issues of peace and war and the relations among nations still serves as a watershed over which all modern thought on international law has flowed.

Pufendorf wrote fifty years after Grotius (1632-1694). He was the first great natural law philosopher interested in international law. He attacked Hobbes for his irreligion and his concept of morality that human beings were guided only by fear. Even outside of political society, he saw a more humane state of nature than the one Hobbes described.[93]

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91. *See* Grotius et al., *supra* note 90, at 4-5.

92. *Id.* at 7.

93. "[T]he life of man [in nature is] solitary, poor, nasty, brutish, and short." *See* THOMAS HOBBES, THE LEVIATHAN 107 (The Liberal Arts Press, Inc. 1958) (1651).

Pufendorf posited a kinder, gentler state of nature built upon moral law. Hobbes, in contrast, saw a conduct which approached the state of constant war—war not only in the battle, but also the threat of war and the expectation of war.

Vattel modified the Hobbesian thesis: States by agreement mitigate the natural hostile state. Customs and treaties modify and mollify this state of nature. His writings preceded the nineteenth century legal positivists.

It was Vattel's position that the paramount natural right of states was self-preservation. It existed in a world without judges, where each claimant was its own judge. States possessed the right to wage war to vindicate their positions. The issue of just wars that so dominated the writings of Grotius and Pufendorf[94] mattered not to Vattel, because each state possessed the right to wage war for its own self-preservation. No person or body existed to determine the rectitude of the claims, and no states were obligated to intervene as self-interest and self-preservation justified neutrality.

Today, many modern international legal historians see Vattel as a transition between the naturalists and the positivists. Vattel's thoughts ultimately give rise to a conceptually workable international order. Despite the absence of an overarching moral regime or agreed-upon rules, international law is binding upon the states because they have agreed to be bound and treat the rules as binding—legal positivism provides the mechanism.

These sessions on international law enabled the students and teachers to bridge many schools of thought. Pufendorf, Vattel, and Grotius incorporated many concepts which already had been explored, and provided new insights into the foundations of law and the problems of order. Grotius provided further evidence of the impact of Roman law. He introduced natural law which was reflected in Pufendorf and later in Blackstone, Burke, Story, and others. Vattel was a profound and disturbing link to modernity, yet he created a system which provided order in an amoral world. Any of these writers can inspire great interest and keen insight for students as they begin to study thinkers of the modern era.

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94. Both maintained that nations should only engage in just wars. Theoretically, there could be no neutrality as morality bound nations to intervene on the side of the just.

5. William Blackstone and Commentaries on the Laws of England.—The natural law discussion of the founding giants of modern international law leads quite naturally (pun intended) to Sir William Blackstone (1723-1780), the great English legal writer who had such a profound influence on the American Colonies. From 1765-1769, Blackstone published his four-volume compilation of his Oxford lectures as the Vinerian Professor of Common Law,[95] *Commentaries on the Laws of England.*[96] Blackstone's compilation became the most important Western legal treatise ever published. It was the dominant law book in eighteenth century England and America.

Blackstone had two purposes for this treatise: to demonstrate that law was a proper subject for study by gentlemen in search of a liberal education, and to educate the landed gentry in the character of English law (as opposed to civil and canon law which had been traditionally studied by the elite at university). He succeeded on both accounts. His prose was elegant and direct. It was easily accessible to the beginning law student, and proved to be an excellent primer for novices on both sides of the Atlantic.[97]

His most significant achievement, however, was his popularization of English constitutional development. The observations of Montesquieu in *The Spirit of Laws*[98] inspired the American political theorists of the Revolution and the Constitutional Convention; but it was Blackstone who provided the lawyer's trained observations of a *constitutional* system in action. Americans saw checks and balances,[99] due process,[100] legislative

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95. In 1752, Blackstone was bitterly disappointed after having been denied the Regius Chair in Civil Law. It is interesting to speculate what path he and the law might have taken had that honor not been denied him.

96. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Legal Classics Library ed. 1983) (1765) [hereinafter COMMENTARIES]. The treatise was the most ambitious undertaking since Bracton's great work in the 13th century. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (d. 1268). *Commentaries on the Laws of England* proved to be a best-seller at home and in America.

97. Novices and lawyers alike used *Commentaries on the Laws of England* in its many editions. It was often the frontier lawyer's only law book and it had much to teach. For example, Blackstone's rules of legislative interpretation are still hornbook law.

98. CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS (1748).

99. COMMENTARIES, *supra* note 96, at 150.

100. *Id.* at 134-35. The language in this section has been the rallying point for many a "takings clause" case.

power,[101] and freedom of the press[102] as fundamental components of a legitimate system of government. The Founding Fathers and subsequent generations of American lawyers viewed the constitutional world and the realm of practice through Blackstone's eyes.[103]

Blackstone based his system of laws upon the law of nature as constructed by Grotius and Pufendorf.[104] Men in society possess fundamental rights, and municipal law (state law) must protect and enhance those rights. These rights of persons which the government must protect will seem inalienable to the average American law student.[105] The government is to protect and defend personal security, liberty, and property.[106]

The system of laws that best protected these rights was the British form of mixed government. The King's power was checked by the Parliament, and he could act only with its consent. The King brought power and executive action to bear. The Lords brought honor and goodness. The Commons were endowed with wisdom to select the best means to accomplish the objects of state.[107] Students quickly grasp that this working model was the inspiration for the United States Constitution.

Blackstone shows that precise and elegant language can train students best and excite an interest in the law. His treatise is proof that one can

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101. The British Parliament, unlike the American Congress, possesses power that is only limited by natural law. *See, e.g., Id.* at 156-57. It is school child knowledge that ours is a government of limited powers with three separate and co-equal branches. Yet, in the abstract, an argument can be made for legislative supremacy in America, as even under the United States Constitution, the judiciary and executive are creatures of the legislature.

102. COMMENTARIES, *supra* note 96, at 159-60.

103. Americans dodged Blackstone's assertion that the common law was not received by the American colonies. *Id.* at 104-05. By ignoring his contention that English common law was not received and therefore did not apply, colonists claimed the unfettered rights and prerogatives of English citizens. We can be forgiven this selective reading because we won the Revolution.

104. COMMENTARIES, *supra* note 96, at 38-44.

105. But it was Blackstone who stated these ideas comprehensively. The four volumes were portable—not only for law students, but also for American lawyers on the frontier who often had few books (*the Commentaries* and *the Bible*) in their offices.

106. COMMENTARIES, *supra* note 96, at 125.

107. Here, Blackstone borrows from Aristotle when he analyzes forms of government. *See generally*, ARISTOTLE, POLITICS (Ernest Barker trans. & ed., 1962). He concludes that the British mixed form of government selected the best qualities from history to produce the most perfect form of government. COMMENTARIES, *supra* note 96, at 49-50.

be both profound and accessible. He argues eloquently that law is a cornerstone of liberal education. Indeed, if we are to be good citizens, the law must be a foundation for education.

It is easy to understand his natural law system which underpins the feudal liberties and prerogatives of the English system.[108] Blackstone gives American law students access to their English law heritage. They can then discern how America changed some of the forms to honor the spirit.

6. Edmund Burke and Reflections on the Revolution in France.— With the recent rise of neo-conservatism, Edmund Burke has become fashionable.[109] After digging deeply into Burke's most famous work, our students, regardless of political bent, found it hard to see how such an eloquent and brilliant commentator on the affairs of mankind ever could have been unworthy of acquaintance.[110]

Edmund Burke (1729-1797) was the son of an Irish attorney. He attended Trinity College, Dublin from 1743-1748. With his 1756 publication of *A Vindication of Natural Society*[111] and *Philosophical Inquiry into the Origin of Our Ideas on the Sublime and Beautiful*,[112] he was established as one of England's leading writers. Burke entered political life, representing in Parliament the great seaport of Bristol, from 1774-1780. During this period, he championed the American cause in the

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108. One of the ideas that our students found most interesting was tracing the origin of many of our rights and ideas about government from the development of feudal common law. Once that is seen, students observe that the American Revolution was, in essence, a very conservative one, much like the Glorious Revolution (1688). Americans were not establishing a new world order, as the French attempted; they revolted to reclaim and retain their rights as Englishmen.

For an excellent, yet short analysis of the feudal origins of our ancient liberties, *see* Robert L. Stone, *We Inherit an Old Gothic Castle*, 8 HASTINGS CONST. L.Q. 923 (1981).

109. Burke's conservatism, although appealing to many neo-conservatives, does not fit neatly with the cabins of their minds. *See, e.g.*, James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913 (1986) (writing on five well-known conservative judges).

110. Burke was a man of letters who wrote extensively on legal, political, and aesthetic subjects. He made a very handsome living at it, and was well-respected in the intellectual community. Burke was a peer of Dr. Johnson and his crowd, all the while remaining one of England's greatest Parliamentary orators.

111. EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY (1756).

112. EDMUND BURKE, PHILOSOPHICAL INQUIRY INTO THE ORIGIN OF OUR IDEAS ON THE SUBLIME AND BEAUTIFUL (1756).

Revolution. Burke devoted his life to five "'great, just, and honorable causes': the preservation of the English Constitution, the emancipation of Ireland, the emancipation of the American Colonies, the protection of the people of India from the misgovernment of the East India Company, and opposition to the ravages of the French Revolution."[113]

Reflections on the Revolution in France[114] was Burke's masterful condemnation of that world-shattering event. In graceful and thoughtful prose, he remonstrated against arbitrary power—whether it was the power of James II or Warren Hastings's East India Company. He would restrain passions. He held unlimited freedom in disfavor and was repelled by complex, abstract political theories which did not correspond to reality. He spoke with passion on the virtues of constitutional exercise of power. Like Montesquieu and Blackstone, he admired and defended the distribution of power in England.[115]

Burke was a realist. He abhorred political revolutions, like the one in France, because they sweep aside the barriers which curb power.[116] He knew that government is something more than the mere exercise of political power: "Government is a contrivance of human wisdom to provide for human *wants*."[117] Wisdom, he believed, is required to construct the device. Power, alone, is not sufficient.[118] "Good order is the foundation of all good things."[119] The exercise of power must be tempered

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113. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28.

114. *Id.*

115. George III's reign was seen as an aberrant flaw in the system. Burke viewed the King as having subverted Parliament to render it an instrument of the Crown. This corrupted the checks and balances found in the mixed form of government.

116. His position is similar to Thomas More's in *A Man for All Seasons*. More would give the devil the benefit of the law rather than root out the laws to get the devil. More and Burke knew that if there are no laws, then there is only power and passion. ROBERT BOLT, *A Man for All Seasons*, *in* LAUREL BRITISH DRAMA: THE TWENTIETH CENTURY (conversation between Will Roper and More) at 394-95 (Robert W. Corrigan ed., 1965) (1960). The thicket that offers protection to More and others is the thicket of prescriptive feudal rights and prerogatives which are the source of so many common law liberties.

117. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 72 (emphasis in original).

118. He would disagree most vehemently with Chairman Mao who contended that "Political power grows out of the barrel of a gun." MAO TSE-TUNG, SELECTED WORKS, Vol. II., *Problems of War and Strategy* (6 Nov. 1938).

119. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 262.

with intelligence and restrained by tradition.[120] His government requires virtue.[121]

Reflections on the Revolution in France is a conservative work founded upon intelligent observation of human nature and folly. The Regicide and Commonwealth were too close to Burke. Burke feared that the passions of the French Revolution would breach the English Channel, consume England, and destroy her liberties.[122] He also feared the zealous pursuit of perfection on earth which had captured France. Conservatism, caution, and respect for institutions and prescriptive rights were his hallmarks.[123]

To Burke, society was a contract. We hold only life estates and turn them over to our children and children's children. We should not commit waste or rend the fabric. Our heritage is not ours to abuse.[124] The Revolution, as Burke aptly demonstrated, had destroyed France's institutions. With the power of the nobles and Church destroyed, there was nothing to check the power of Paris and the army.[125] History proved him right. The French Revolution was the first totalitarian revolution.

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120. This is quite Blackstonian. You will recall how Blackstone traced the long growth of English liberties and held for a "mixed" form of government where wisdom, goodness, and power would be united to cooperate for the good of the nation. *See supra* note 107.

121. *See supra* note 28.

122. *Reflections on the Revolution in France* was written to counter the revolutionary fervor flamed by such propagandists as Rev. Dr. Price. Burke was horrified by the demagoguery and believed the Jacobins would destroy England if not exposed and checked.

123. Blackstone, too, saw England's liberty founded upon ancient prescriptive rights. He rejected natural law concepts found in both Aristotle and the French Revolution, as natural rights failed to take into account fundamental differences in societies. REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 109-11.

This deep respect for long-established traditions and society's values permitted him to defend with consistency the British Constitution, the American Revolution (based upon claims of rights as Englishmen), the freedom of the Irish people (as a privileged child he had observed the destruction the English had visited upon Irish society), and the emancipation of the Indian peoples from the oppression of the East India Company.

The French Revolution, of course, overturned its heritage in attempting to fashion a "new man." Burke viewed the destruction of the prescriptive rights by the Revolution as intrinsically linked with the Terror. History instructs that "New Men" are hard to create: witness the Bolshevik Revolution and the Chinese Communist Revolution. New Men arise unrestrained with their old passions and prejudices. Burke's fears were not unwarranted.

124. REFLECTIONS ON THE REVOLUTIONS IN FRANCE, *supra* note 28, at 108-109.

125. Burke correctly predicted "the man on horseback." *Id.* at 236.

It set the pattern for the Communist revolutions of the twentieth century.

The tides of history have changed. Burkean ideas may yet enjoy a renaissance. Communism and its revolutions are bankrupt of spirit and property. Burke's reasoned appeal to leadership, virtue, quality, intelligence, and ordered liberty may guide attempts to reestablish law and order in an era of rapid change. At a minimum, Burke's writings suggest history must not be disregarded,[126] and institutions and values must be understood before they are altered, abandoned, or replaced.

7. The Federalist Papers.—Professor Wiecek began his seminar by noting that *Legal Classics* was a continuation of a great dialogue extending over a millennium. Important legal thinkers, through their writings, were speaking to us about many of the issues with which we grapple. In *The Federalist*,[127] James Madison and Alexander Hamilton entered into a debate on the nature of republicanism. At the time of the Constitutional Convention, the debate was about a century old. James Harrington, in *Republic of Oceania* (1656), had outlined the essentials of a pure republican tradition. Adam Smith's assumptions about human behavior and individualism in the 1770s established a tradition of liberalism in the ongoing debate.[128]

Madison and Hamilton had certain assumptions about human nature and physical reality.[129] They were informed and inspired by the universe of Isaac Newton with its order, harmony, and balance. A good gov-

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126. "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 1 THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS ch. 10, *Flux and Constancy in Human Nature*, at 82 (one-vol. ed. 1953). Karl Marx made a similar observation in *The Eighteenth Brumaire of Louis Bonaparte*: "Hegel says somewhere that all great historic facts and personages recur twice. He forgot to add: 'Once as tragedy, and again as farce.'" KARL MARX, *The Eighteenth Brumaire of Louis Bonaparte*, *in* MARX AND ENGELS: THE COMMUNIST MANIFESTO 47 (Samuel H. Beer ed., 1955).

127. THE FEDERALIST, *supra* note 22 and accompanying text.

128. After the Revolution and the establishment of the United States, the earlier traditional republicanism was exemplified by the anti-federalists. Liberal republican thought is seen best in *The Federalist* No. 10. Both were nationalists and republicans. Republicanism drew on Harrington's *Oceania*, Montesquieu, and Locke, as well as the Commonwealth Men (seventeenth century polemnacists such as Trenchant and Gordon).

129. Hamilton had no illusions about human perfection. Once, he remarked to Jefferson after dinner, "Your people sir, is a great beast." *Quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 108 (15th ed., 1990). There is no hint of Thomas Jefferson in *The Federalist*. Although the Conservative Nationalists have won the debate (*see supra* notes 109-26 and accompanying text), the tension between Jeffersonian and Hamiltonian views of mankind is still present in today's political life.

ernment could be perfectly balanced—force by force, interest group by interest group.[130] Blackstone and Montesquieu knew that checks and balances could prevent baser political impulses from destroying the new republic.

To win over the anti-federalists[131] in crucial New York, a state dominated by anti-federalists such as Governor George Clinton,[132] *Federalist No. 1* argued that societies of men can establish good government by reason.[133] Reason and choice would permit the establishment of good government rather than the dead hand of tradition. Order was necessary, as well as an energetic and efficient government. Vigor[134] is essential to the establishment of liberty.[135]

Federalist No. 10 was Madison's elegant exposition on the great republic.[136] Faction is the bane of political life. Citizens united by passion or interests could destroy the nation. Common impulse opposed to the

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130. *See generally* THE FEDERALIST, No. 10 (James Madison).

131. The anti-federalists generally are given short-shrift in most law school classes. It might be interesting to read anti-federalist works and compare them with the federalist position which triumphed, in the same manner as the comparison of American constitutional traditions in the next section. For the definitive collection of anti-federalist thought *see* H.J. STORING, THE COMPLETE ANTI-FEDERALIST PAPERS, 7 vols. (1981); for a student-sized edition *see* THE ANTI-FEDERALIST PAPERS AND CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986).

132. Clinton was "a doughty politician whose principles and prejudices and skills made him the most formidable of opponents to the proposed Constitution. Plainly New York was a state that could easily be lost yet had to be won." THE FEDERALIST PAPERS, Introduction at ix (Clinton Rossiter ed., 1961). Had New York not voted for the Constitution, it would have failed as New York was a leading commercial and financial state which lay at the crossroads of the new nation.

133. THE FEDERALIST No. 1, *supra* note 22, at 3 (Alexander Hamilton).

134. "[V]igour of government is essential to the security of liberty . . . ." *Id.* at 5.

135. This is, of course, what the anti-federalists were worrying about. An overly vigorous and efficient government could destroy personal freedom. A weak and enfeebled government would destroy the people's liberties. *Cf.* REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 202, where Burke noted: "Nothing turns out to be so oppressive and unjust as a feeble government."

136. THE FEDERALIST No. 10, *supra* note 22, at 56 (James Madison). Prior to the United States, the republican experiment had been limited to ancient city-states, Venice, and the Dutch Republic. Republics were a rare form of government, and had thrived only in small territories with relatively homogeneous populations. It was an open debate whether a large republic would spin apart by centrifugal force, or crush liberties with centralism. In *Federalist No. 10*, Madison creates a vision of a free society which is free precisely because it masters the passions and factions of a continental state.

common good was a grave threat. How to control the factions was the essential question. Factions could pit class against class and region against region.[137] Yet, party and factions are necessary for the ordinary operation of government. Government must control the governed and oblige the governed to control themselves.[138]

Representative government could be structured to control the passions. The principle of representation elevates those elected from the common mass. Whereas historic democracies were moved by passion to immediate action and often demagoguery, representative government offered the chance for a more tempered form of government. Representatives are more capable of a broad view.[139] In a large republic, representatives are more isolated from the passion of the day. Factions can neutralize one another. It is less probable that the majority will invade the rights of the minority.[140] For government to control and yet not overwhelm the governed, checks and balances are provided through the separation of powers. "Ambition must be made to counteract ambition."[141] Federalism was combined with national power and that national power is limited by the compounded federal republics.[142] With so many different citizens and views, it is hard to combine to oppress the minority.[143] The fostering of a multiplicity of interests and sects provides for national security.

The concerns of the authors of *The Federalist* are still vital today. One need only look to the war powers issue to see that the debate on the limits of checks and balances is still very much alive. Likewise, factions are still with us. Perhaps too much so in the era of the savings and loan bailout and single issue politics, such as the Pro-Life movement! The insights of Madison and Hamilton are still instructive, even to

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137. Europe had seen what religious factions could do in the Thirty Years War. Factions endure today in Northern Ireland and Lebanon. Their fury, once uncabined, is hard to control or resist.

138. THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cook ed., 1961).

139. That's the argument. To look at today's solons in Congress, one never knows. But, American history provides examples of unselfish devotion to the common weal. *See* JOHN F. KENNEDY, PROFILES IN COURAGE (1956).

140. Madison despised Rhode Island, where he found an insecurity of rights and oppressive factions of majorities. THE FEDERALIST No. 51, at 352 (James Madison) (Jacob E. Cook ed., 1961).

141. *Id.* at 349.

142. THE FEDERALIST Nos. 45, 48 (James Madison).

143. THE FEDERALIST No. 51 (James Madison).

students who have been exposed to first year constitutional law and advanced courses on our federal system. *The Federalist* papers tell us what we have long known; but its fresh and vigorous prose, its vision of a strong and efficient government, and its telling arguments make us better lawyers and citizens. It deserves to be rediscovered and reread by every generation of lawyers.

8. Survey of Nineteenth Century Conservative Legal Thought.— Professor Wiecek's next class focused on writers who represented conservative legal thought in nineteenth century America. His readings demonstrated how long-settled political and philosophic beliefs were the result of historic clashes of deeply held beliefs and political positions. The debate over nationalism and state sovereignty has largely ended, but its study shows *the road not taken* and permits reflection on the development of constitutional thought.

Alexander Hamilton, John Marshall, Joseph Story, and Daniel Webster are well known to American lawyers. We assume that the Hamilton-Marshall-Story-Webster constitutional tradition was the correct one. James Madison, John C. Calhoun, and Thomas Jefferson were articulate proponents of the opposing southern state sovereignty tradition. Neither tradition was the obviously correct, orthodox, or dominant one prior to the Civil War. Because of the War, we incorrectly assume that a nationalist conservative view was always fundamental to our government. Yet, before 1830, the state sovereignty view was more orthodox and Justice Story was the revolutionary. However, it was his nationalist vision that triumphed with the Civil War. The Reconstruction Amendments[144] were quite *radical*: they embodied the final triumph of the nationalist vision,[145] and a revolutionary change in constitutional order in race relations and equality. These readings on American constitutional thought showed the logic and force of the debate that took a civil war to settle.

In Hamilton's view, the Supremacy Clause[146] was the focal point and ended the argument. State sovereignty advocates relied on the Tenth Amendment.[147] These proponents of state sovereignty argued that the balance of federalism was not struck in 1787.[148] They viewed the Con-

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144. U.S. Const. amends. XIII (1865), XIV (1868), & XV (1870).

145. *Id.*, amend. XIV (1868).

146. *Id.*, art. VI, § 2.

147. *Id.*, amend. X (1791).

148. Nationalists thought all federalism questions were settled in 1787 by the Constitution. Compromises reached at the Convention, the Bill of Rights, and checks and balances were thought to have established the balance.

stitution as an effort to inhibit centripetal power. They feared the federalist/nationalist strain of republicanism would pervert the Constitution in the nationalist direction and destroy liberty.

The Virginia and Kentucky Resolutions[149] exemplify the orthodox Southern view.[150] Jefferson was the author of the First Kentucky Resolution, which declared that states were united by compact and states constituted the general government.[151] Only certain powers were delegated to the national government (war, interstate trade, and similar powers). The balance of powers were reserved to state sovereignty. The primary assumption was that powers not enumerated were *not* delegated by the states or people to the national government. Thus, the Alien and Sedition Acts were *void*. Each state is to be its own ultimate judge on the constitutionality of legislation to protect the people and their liberties.[152] Jefferson cited and relied on the Ninth and Tenth Amendments for his authority in finding no support for this federalist usurpation.

The Second Virginia Resolution was the product of James Madison. His ideas were similar to Jefferson's: states had the power to interpose themselves between the constitutionally abhorrent legislation and arrest the evil. In the 1830s, South Carolinians cited Madison as authority for *nullification*.[153] The Second Kentucky Resolution leap-frogged over the Virginia Resolution and concluded nullification was proper. Of course, the debate over nullification did not evaporate with the 1820s resistance to tariffs—nullification logically led to secession. The bloody Civil War ended the debate.

Justice Story constructed many of the nationalist arguments which were to prevail. Story, in *Commentaries on the Constitution of the United States*,[154] also concerned himself with the issue of whether the

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149. The Virginia and Kentucky Resolutions, 1798-1799, 5 THE FOUNDERS' CONSTITUTION VOL. V 131-36 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Resolutions].

150. McCulloch v. Maryland, 17 U.S. 316 (1819), and Marbury v. Madison, 5 U.S. 137 (1803), illustrate the Federalist approach.

151. Resolutions, *supra* note 149, at 131.

152. *Id.* at 135.

153. *See* remarks of South Carolina Senator Robert Hayne of the Hayne-Webster debates. *Register of Debates in Congress*, 21 Cong. 1st Sess., Vol. VI, 56-58 (5 Jan. 1830).

154. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed., Boston, 1858).

Constitution was a treaty or a compact.[155] Justice Story looked to the natural consequences which flowed from the Resolutions. If each state could nullify legislation, then the Constitution was a "rope of sand."[156]

He declared society to be a compact which spread over time from past generations to generations unborn.[157] The legislature was not permitted to tamper with organic law. National laws are unalterable except in accordance with the manner prescribed in the Constitution—that is, amendment.[158] For Story, governmental legitimacy rests upon popular sovereignty. The majority rules, and it is limited only by the Constitution. To hold any other view would lead to *revolution or war.*

Story and the nationalists prevailed after a long and bloody civil war. The readings show that the constitutional debates on the nature of limited government were exciting and long-standing, and that the Southern tradition came very close to being the orthodox view. Each vision was based upon fundamentally different perspectives on the role of a national government. What emerged from the War was a second Constitution: the elimination of slavery altered the constitutional balance forever, reduced the power and role of the states, and created a new kind of national citizenship. The debate continues on just what kind of role the federal government should play in fashioning this national citizenship.[159]

9. Legal Education.—Dean Hoeflich turned to the subject of formal study of law and the question of how Americans arrived at their current model for legal education.[160] The Western European model had been

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155. *Id.* at §§ 310-20.

156. "A rope of sand" was a favorite metaphor at the time of the creation of the Constitution and its use persisted well into the nineteenth century. The Oxford English Dictionary defines it as "something having no coherence or binding power." OXFORD ENGLISH DICTIONARY 2575 (788 in the compact edition). Many famous statesmen used the phrase, including John Adams who wrote in 1800, "Our Union will become a mere rope of sand." *Id.*

157. STORY, *supra* note 154, § 325 n.2. Story's views are very close to Burke's on this point. *See* REFLECTIONS ON THE REVOLUTION IN FRANCE, *supra* note 28, at 110-11.

158. STORY, *supra* note 154, § 337, at 225.

159. Consider, for example, today's concerns about the appropriate limits of affirmative action, the right to privacy, the right to abortion, and other issues.

160. Dean Hoeflich assigned four essays on legal education: ROGER NORTH, *Discourse on the Study of the Laws* (ca. 1700-1730), *in* THE GLADSOME LIGHT OF JURISPRUDENCE, *supra* note 41; THOMAS WOOD, *Some Thoughts Concerning the Study of the Laws of England in the Two Universities* (1708), *in id.* at 34; WILLIAM BLACKSTONE, *A Discourse on the Study of Law* (1765), *in id.* at 53; and DANIEL MAYES, *An Address to Students in the Law in Transylvania* (1834), *in id.* at 145.

based upon the sixth century law schools of Beirut and Constantinople, which taught the basic Roman law course over five years.[161] You will recall that formal study of Roman law ceased from the seventh through the eleventh centuries, when it was revived at the emerging universities. Students studied both canon and civil law on the Continent and in England.[162]

In the meantime, in London, attorneys, acting as agents for country landowners, were developing legal practices. These common law lawyers formed guilds which evolved into the Inns of Court. The Inn legal education was practice-oriented. Students were apprenticed to lawyers, and university degrees were not needed to enter the practice.[163] Readings were given and "moots" (similar to our moot courts) were employed to give students practice at reading cases and statutes. As part of their apprenticeships, students sat in court and took notes to learn the cases.[164] These notes were compiled in Yearbooks (the earliest court reports).

During the eighteenth century, reformers wanted to adopt the Continental system of structured civil law education. In the early 1750s, Blackstone stood for the Regius Roman Law Chair at Oxford, but was rejected because he lacked the requisite patronage. Fortunately for common law education, Blackstone was appointed in 1758 to the first Vinerian Chair of Common Law. Blackstone taught in university rather than the Inns because he wanted to train the gentry and inculcate university students with the discipline and character of the common law. He took a very liberal view of the role of legal education and believed it was the most appropriate course of study for students destined to serve their communities and England.

Blackstone was a popular teacher, and his university lectures were immortalized in his *Commentaries*. Prior to the *Commentaries*, there

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161. This was the very curriculum which Gaius had taught and for which he had written his *Institutes*.

162. From the 13th through the 17th centuries in England, civilians, as they were called, studied canon, admiralty, and military law in the universities. Currently, admiralty, military law, and some mercantile law still reveals civil or Roman law roots.

163. In Scotland, legal training continued to follow the civil law model. Lawyers comprised a faculty of advocates who taught at university. Students sat for exams in Latin, made digests and translations from Roman law texts, and presented a thesis.

164. Eventually, these notes developed into the practice of making court reports.

was no comprehensive source for the study of the common law. Blackstone's *Commentaries* and lectures made a university education in the common law possible, and set the agenda for future common law practitioners to the present day. After Blackstone, the university degree (undergraduate studies) in law, followed by a stint at the Inns of Court, was the path of legal education for English lawyers. A careful blending of liberal education in law with practical schooling at various Inns was the essence of effective legal education.

In the American Colonies, there were no universities or Inns, nor were there any attempts to establish them. The colonies, and then the United States, used an apprenticeship format which was often served under a judge. This system served to control the number of attorneys on the seaboard, and it offered frontier students a chance to study law without the expense of a formal education. However, the method did not assure competent practitioners.

In the antebellum North, colleges were becoming universities: curriculum was expanding from theology and classics to law, medicine, and pharmacology. Harvard endowed the Dane Law School and Joseph Story became the first Dane Professor. Story was charged with writing comparative law books and commentaries. Chancellor Kent of New York was becoming the American Blackstone while writing his commentaries on American law[165] and teaching law at Kings College (which became Columbia University). Nevertheless, apprenticeship was still the dominant format for legal education.

In the South, David Hoffman at the University of Maryland in Baltimore organized a course in legal education which covered seven years. He also created the first code of legal ethics. Daniel Mayes, at the Transylvania University was teaching fifty law students in 1833. Rules and principles were taught, and there was much less reliance on mere memorization. Law was becoming a *science* with its own overarching principles. Mayes created a national law school where students used the scientific method to understand the universal legal principles; but university education in the mid-nineteenth century still was not widely accepted. Society was suspicious of university-trained lawyers, and there was not yet proof that university-educated lawyers were better lawyers. The university education, however, could offer a broadly-based education.

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165. James Kent, Commentaries on American Law (1826-1830).

This broad-based vision was not yet universal. Northern university education focused upon practicalities and produced very pragmatic lawyers. The Southern approach, fostered in Lexington (the home of Transylvania University), Charleston, and New Orleans took a more liberal and literary approach. Roman law was studied along with Gibbon's *Decline and Fall of the Roman Empire*.[166] Ultimately, the Northern model prevailed. The Civil War had destroyed the Southern legal culture. In 1870, Harvard Law School was formally established. Harvard's method of instruction became the dominant approach because the study of law as a science was promoted by Langdell. Langdell's touted "scientific" application was primitive. However, its scientific principles and theory fit nicely with the emerging American university[167] which patterned itself after German research universities. Classics and the liberal education program of Mayes and Blackstone gave way to the scientific logic of Langdell's case method.

As with the study of American conservative thought, the study of British and American legal education in the eighteenth and nineteenth centuries exposes students to their legal heritage. It also gives them the chance to question the doctrinaire assumptions of mainstream legal education and to consider the several roads not taken.

10. Austin and Maine.—John Austin (1790-1859) and Henry Sumner Maine (1822-1888) were presented next by Professor Richard I. Schwartz. Although both were nineteenth century legal thinkers, each had a strong influence on contemporary legal thought. The "Law & Society" movement will recognize much in Maine's *Ancient Law* (1861),[168] and legal positivists will feel at home with Austin's *The Province of Jurisprudence Determined* (1832).[169] Maine and Austin were Englishmen who wrote within thirty years of one another, but they had very different views on the role of law in society. Their thoughts persisted into the twentieth century: Weber and Unger have been occupied with understanding the

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166. EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE (1765). It was coincidentally published the same year as Blackstone's *Commentaries on the Laws of England*. The year, 1765, was a banner year for legal education in the West.

167. American technical education was proceeding apace. Land grant colleges were established to teach engineering and agriculture. The classics were no longer the center of the academic universe in the United States.

168. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS (1861).

169. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).

role of authority in complex societies; Durkheim has built on Maine in his study of the organization of society.[170]

Austin saw the law as the force of the state. Law has a central, normative theme.[171] Government is the primary and exclusive locus of legal rules. For Austin, legal rules formed a natural system of normative learning, rules, principles, policies, and procedures for announcing the law.[172] Austin was philosophically aligned with the utilitarians and Benthamites[173] and their vision of a progressive society.

Utilitarian thought maintained that legislation (or sanctions of the sovereign) would improve the human condition if the pains of violating society's norms were sufficiently strong. How was Austin to assert this utilitarian outlook in the face of the Rotten Boroughs and the inept leadership of the Hanoverian kings? He took an expansive view of the sovereign, somewhat akin to Hobbes. The law, commands, or sanctions of the state did not require wisdom. Thus, an unwise sovereign, be it king or parliament, still would be empowered to utter commands which became law (albeit unfortunate laws).[174]

Austin described existing law as a self-contained system. His command theory required that commands of the sovereign be comprehensible.[175] In his system, officials were guided by rules which controlled the behavior of the population. Conformity to these rules was achieved through both consent and the threat of force. Legal authority was derived from both force and legitimacy.[176] Although Austin's thesis did not solve

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170. *See infra* notes 186-94 and accompanying text.

171. Holmes believed society took from the past the central normative schemes as its source of law.

172. This is particularly evident when courts announce rules in accord with legal learning.

173. His friend, Jeremy Bentham, was the founder of the University of London and was responsible for Austin lecturing in law in 1828, the university's first year of instruction.

174. Aquinas would not declare bad law to be law. *See infra* note 228 and accompanying text.

175. Austin's command theory, and his principles of government and bureaucracy, provided the legal themes for the administration of the British Empire.

176. The 20th century legal philosopher H.L.A. Hart was greatly influenced by Austin. Hart was a positivist in law, and a utilitarian in morals. Hart built on the foundations of Austin, and wrestled with the unanswered questions of the authority of law in a modern society. Hart puzzled over such fundamental issues as the location of the sovereign in a sophisticated society, the description of the power that confers rules

all the puzzles of law and sovereign authority in an advanced nation state or empire, it did provide the modern intellectual framework for the analysis of bureaucratic rules and legislation which underpins much contemporary legal thought.[177]

Maine saw law as an expression of culture, and believed that legal analysis required close attention to the origins of the law. Unlike Austin, he sought to understand the law not by studying progressive, sophisticated societies but from assaying primitive ones.[178] He discerned weaknesses in Austin's theory that law was the austere command of the sovereign. Commands, alone, must ultimately fail: a system based upon the imposition of commands falters because sanctions, if not followed, must be succeeded by more severe sanctions. As the escalation continued, even the severity of sanctions could not buttress the failure of authority. Thus, something more than the mere sanction of the sovereign was required for law. Maine saw the vital link between what people think is right in society and what the law is.

In primitive, patriarchal societies, the family was the central institution and the source of legitimate authority.[179] As society developed, territorial contiguity replaced kinship.[180] As society evolved, rights underwent a change from status to contract. Custom became less important,

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(something more complex than Austin's command of a sovereign backed by sanctions), and a system of rules accepted by the population. For Hart, these legal rules had to be recognized by the people as being valid and there had to be a mechanism for rule change and adjudication. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

177. *See, e.g., id.*

178. He dismissed earlier theorists as having been unduly influenced by Roman law (which, as we have shown, was an advanced legal system flexible enough to have been re-adopted in the late Middle Ages and then to have served as an inspiration for the civil law codifications in the nineteenth century). Maine believed that underlying forces could not be discerned when viewing a complex legal state and, hence, turned to more primitive cultures for his research and thesis.

179. If Austin supplied the thesis for the bureaucratic organization of the British Empire, Maine provided the sympathy for native institutions which allowed the empire builders to respect native traditions while ruling vast territories.

180. For example, as Rome became more advanced, the rules of adoption expanded to allow nonrelatives to adopt. Under Roman law, very elaborate schemes were created for regulating relations between Roman citizens and noncitizens, and for acquiring Roman citizenship. This kind of sophistication is not possible in a society based upon kinship. But as the bonds of kinship slip, the power of the state rises. This is quite evident in contemporary America where the welfare state and entitlements have supplanted the extended family and neighborhood charity.

and relations were governed by more technical rules embodied in the legal system. Kinship and familial relations were no longer paramount. Slaves and aliens (traders and others) were still not accorded all the rights of Roman citizens. But the law of Rome grew to accommodate the commercial and social needs of both Romans and aliens. As Roman law became more complex, it also recognized valuable commercial and social relations with noncitizens. Ultimately, more choices and options abounded for both citizens and aliens as contract liberated the ancient Romans from status.[181] Risks were present, however, as the kinship network lost its vitality and people structured their lives around objective rules and not safe, familial and time-honored relationships. Custom had become less binding and rules became more objective and abstract.

Austin and Maine both contributed to how we govern and formulate legislation in our modern world.[182] Austin imagined the moral foundations for the modern bureaucratic state, and contributed to our understanding of the locus of authority in a progressive society (which was abandoning its traditions and heritage as it sought to fashion a better world).[183] Maine's work showed how custom created a moral acceptance of law. This custom, with its ancient roots, still provides the glue of manners, expectations, and moral and legal assumptions that hold our increasingly complex society together as it continues to evolve.[184]

11. Durkheim, Weber, and Unger.—The problems of authority and the moral source of law that were studied by Maine and Austin continued to be considered by twentieth century legal thinkers as society grew increasingly complex. Professor Schwartz picked up the story and described how the branches of thought that sprang from Maine and Austin

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181. With the collapse of the Empire, society became more primitive and status became increasingly important. Feudal relations and law were heavily imbued with status.

182. We often unconsciously view the legal world and society through assumptions constructed by them.

183. For those who try the alternative syllabus, *Legal Classics*: Problems in Law and Literature (Table 2, *infra*), you might wish to explore the ramifications of utilitarianism when carried to the nth degree in John Calvin Batchelor's *The Birth of the People's Republic of Antarctica*.

184. When Maine was writing, society had moved from status to contract. In the late twentieth century, the pendulum appears to be swinging back in the West. Employment status is replacing freedom to contract, citizens are concerned with entitlements, and legal decisions often rest upon the appeal to status concerns rather than concern for the common weal. *Cf.* FREDERICK A. VON HAYEK, THE ROAD TO SERFDOM (1944). So, too, in the capitalist realm of real estate development. *See* MALLOY, *supra* note 18.

grew and, occasionally, entwined. In this century, Austin's model of the sovereign was established in its own right, and Western utilitarian and bureaucratic legislation can trace its philosophical origin in his theories. The autonomy of Austin's system replaced and subordinated customary law.[185]

Nevertheless, there remained much to be gleaned from studying law and society. Durkheim (1858-1917), like Maine before him, searched out organizations in society.[186] He observed that simple societies require minimal divisions of labor,[187] but complex societies have great divisions.[188] In a complex, modern society, the principle of solidarity was difficult to observe. Durkheim studied morality to determine the adhesive which holds society intact.[189]

He observed mechanical solidarity in primitive societies because every member knew the behavioral constraints and norms. Punitive sanctions were invoked to express disapproval and to drive deviants from disobedience[190] toward compliance.[191] These sanctions corrected illegiti-

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185. Maine, if taken far enough, reaches the same result, as when society evolves, freedom of contract supplants status and men become more free and autonomous.

186. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls ed., 1984) (1933).

187. In primitive tribal societies, everyone does approximately the same tasks and has a consciousness formed by their role. Contrast this with modern society where the lawyer or aerospace technician has little in common with the philosopher or the aborigine bushman.

188. He also observed that complex societies have less cohesion or solidarity.

189. He used modern scientific research based upon anthropologic evidence. The Greeks used the same method to study primitive and ancient societies to learn about their world. "*Plus ça change, plus c'est la même chose.*" ("The more things change, the more they remain the same.") Alphonse Karr (1808-1890) *Les Guêpes* (Jan. 1849), *quoted in* JOHN BARTLETT, FAMOUS QUOTATIONS 627 (Emily Morison Beck ed., 14th ed. 1968).

190. Although the Talmud prescribes the death penalty for certain offenses, the stringent requirement of proof and the people's compliance were such that this extreme sanction was rarely applied. Had the Jewish community been less well-ordered and civilized, the Talmudic Code undoubtedly would have crumbled because the Jews lacked the legal sanctions of the Christian and Moslem states in which they resided. Had the Code crumbled, it is doubtful that Judaism would have survived as we know it today.

191. Modern law, to the contrary, often liberates. For example, look at all the choices that are present in modern corporate and financial law. Property law has evolved from feudal status to copyright law grappling with the classification of computer chip technology. Very little modern law is penal in nature, and much of it is deliberately enacted to expand possibilities of association and enterprise.

mate behavior and reaffirmed the norm.[192]

Organic solidarity was found in modern society where breaches of society's norms harmed isolated individuals and restitution was employed to return the injured party to the status quo ante. The law of contract illustrates this when contract damages attempt to mitigate the harm, rather than punish the wrongdoer for the breach.[193] In spite of complex modern society, the potential remained for organic solidarity to hold the system together. The crucial issue was how to organize the economic activity to optimize development, without undermining the social order.[194]

Weber (1864-1920) analyzed bureaucratic legal principles and questions of authority.[195] In primitive societies, custom was the basis for authority.[196] It evolved from a stable and predictable society. However, although custom may have been *a* source of law in rapidly changing and evolving societies, it was an inadequate source in advanced systems. According to Weber, customs alone were insufficient to hold societies together in advanced states.[197]

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192. Complex ancient societies existed, but with different norms from modern complex societies. Despite their complexity, punishment often occupied a prominent place in the matter of things. For an excellent description of this phenomenon, *see* JEAN LEVI, THE CHINESE EMPEROR (Barbara Bray Trans., Vintage Books 1989) (1985). This historic novel is the story of Ch'in Shih Huang Ti, the Great Emperor who built the Great Wall and for whom China is still named. Despite the sophistication of the culture and the bureaucracy, crime and punishment occupied a very high profile in the minds of the people and the machinery of the state.

193. To be sure, punitive damages are sometimes allowed in contract actions, and in cases of strict liability, damages are assessed once liability is found, regardless of negligence or moral blameworthiness on the part of the defendant. But these are still the exceptions.

194. Medieval cities, when feudalism was losing its grip, established charters and created new structures to cope with the breakdown of social order. Eventually, some of these havens and their prerogatives were squelched by the nationalism and centralizing forces of the developing nation-states. For example, the walled town of Loudun, which had resisted the centralization of the French monarchy until the walls were torn down under Cardinal Richelieu, was destroyed and the citizens lost their ancient liberties. ALDOUS HUXLEY, THE DEVILS OF LOUDUN (1953).

195. MAX WEBER, LAW IN ECONOMY AND SOCIETY (1961).

196. As it was for Maine. *See generally* MAINE, *supra* note 168.

197. As societies advance and become more complex, charismatic leadership and authority create customs which bind society. Great religious leaders such as Christ, Mohammed, and Buddha derived authority from God, or because they were perceived to be God. Even in some advanced societies, such as Imperial Rome, religion played a vital force. Emperors were often worshipped as gods as part of the state religion. Early Christians

Eventually, a bureaucratic system of great rationality and stability is created to maintain the norms and order society. Weber made students think about how the passion, fertility of mind, and charisma of the founding leaders can be managed by bureaucratic organizations for the good of society. For if bureaucracy fails to accommodate aspirations, order for order's sake will give way to revolution and change.[198]

Unger[199] observed that in great societies, bureaucratic law could be read as governmental statements.[200] Legal order and law were autonomous. For him, sets of people, who depended upon their relationship to each other and their places in society, had their own ways of implementing laws.[201] For example, in the late Middle Ages, commercial classes formed alliances with the Crown against the Church and the aristocracy. Sovereigns granted concessions and charters in exchange for political support. Eventually, the feudal power of prelates and barons was dislodged by the centralized monarchy and the emerging merchant classes. What emerged is the modern bureaucratic state, and that may not be enough to manage our political lives.[202]

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were not persecuted out of religious hatred or intolerance; they were persecuted because their refusal to worship the state gods was viewed as subversion.

At the founding, the charisma and leadership alone binds the people to the leader but, as the society matures, charismatic customs will not suffice. Eventually, charisma becomes routinized. Consider, for example, how the Catholic Church organized a large and bureaucratic order to manage its mission. The charisma of Christ was melded into the organizational structure of Imperial Rome and it lasted more than a millennium until the Reformation.

198. Witness the collapse of the Soviet system when it became apparent to the most die-hard Communist that the commissar had no clothes and that some animals were more equal than others.

199. Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory (1976).

200. Note the derivation from Austin's thesis on the commands of the sovereign.

201. One of the cardinal principles of common law heritage and tradition is that like cases be treated alike. America has incorporated this principle into its Constitution. U.S. Const. amend. XIV (1868). Yet, Unger believes that modern society has become an end game for its sophisticated players. Special pleadings abound. There is a failure to treat like cases alike. Unger contends our focus on corporate interests, special interests, and rights will rend apart society.

Burke, too, was concerned with the subversion of the whole for the short-term benefits of the individual, and was willing to place his trust in prescriptive rights, tradition, custom, and ordered liberty. *See generally*, *supra* notes 109-26 and accompanying text. Unger, however, places little credence in the role of culture and custom in complex modernity.

202. The state has deteriorated into interest groups waging internecine war.

> If bureaucratic law fails to provide the structure that both society and personality demand and that the breakdown of custom shatters, what can be put in its place? Can the need for organized power be satisfied without a hierarchy of ranks? Can the awareness of the capacity to create social arrangements, an awareness associated with the decline of custom, be somehow reconciled with the experiences . . . that life receives weight and direction from an order that precedes the human will?[203]

Austin's bureaucratic theories have triumphed. Customs have become increasingly rationalized in modern society. The tyranny of the group and family has given way to the anomie of daily life where many citizens feel powerless. The readings from Weber, Unger, and Durkheim show that dangerous tensions exist in the modern bureaucratic state. Society has created complex organs to replace the norms of primitive culture; yet, the solution is incomplete, and gives rise to new problems, legal and moral.

Although our complex society has liberated us, it has also unleashed factions. These divisive factions and special interests, in pursuit of narrow goals, often undermine society's accepted norms and render the state unable to provide a nurturing environment.[204] Students recognize that we have come a long way from Austin's command of the sovereign as we strive to rein in the leviathan, and make it responsive to our needs.

12. Holmes, Llewellyn, and Pound.—Professor Sam Donnelly observed to me, while I was preparing this manuscript, that one of the things *Legal Classics* was about was the teaching of argument and rhetoric. He seconded comments that had been made by a number of the faculty and students who felt the exposure to various forms of legal rhetoric and argument was one of the most important benefits of the course.

Perhaps the most significant form of common law argument and rhetoric of our century is legal realism and pragmatism. Professor Donnelly selected Holmes, Llwellyn, and Pound because they made fundamental contributions in the twentieth century to the continuing legal dialogue. They also are useful for understanding where contemporary legal thought is heading. Oliver Wendell Holmes, Jr.'s (1841-1935) giant

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203. UNGER, *supra* note 199, at 133.

204. This is not the future James Madison penned in *Federalist No. 10*. *See* THE FEDERALIST No. 10. (James Madison).

presence forms a backdrop for our legal realism and the pragmatic ability of the law to solve contemporary human problems.

Because Holmes occupies such a place of honor in the American pantheon, it was useful to spend some time discussing Holmes, the man.[205] Students were presented with two visions of Holmes. Some critics perceived him as less than a paragon of virtue. He had a reputation as a womanizer, a militarist, an extreme skeptic of moralistic opinions, and what today would be termed a racist.[206] He also is remembered as one of the first major legal historians and legal philosophers in the United States. He inspired legal thought movements and defended freedom of speech, his opinions promoted court deference to legislative enactments, and he was a Civil War hero.[207]

Holmes was a man in pursuit of truth. He aspired for law to transcend the dry record of the reporters and to incorporate ideas developing in other intellectual disciplines, including science, economics, and philosophy.[208] Holmes's decisions depict the characteristics of American Pragmatism. He rebelled against the traditional logical approach

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205. Our experience was that students were fascinated by the man and were able to see how his times influenced his thought and works. To that end, Professor Donnelly assigned some biographic material in addition to selected readings in *The Common Law*. HOLMES, JR., *supra* note 78, Introduction & Lecture III; O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

You might wish to follow his suggestions: MARC DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS (1870-1882) Vol. 2, ch. 7, "A Theory of Torts" (1963); CATHERINE DRINKER BOWEN, YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944); and SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989).

206. Although he supported abolition, he did not believe initially that the freed slaves were ready to deal with freedom in society. He later regretted his opinion when history proved him wrong.

207. The impact of the Civil War loomed large for Holmes as it did for most Americans of the period. It made him a "militarist" and colored his outlook. He was proud of his patriotism and military service. His tombstone at Arlington National Cemetery reads: "Oliver Wendell Holmes . . . Capt. in Mass. Voluntary Infantry, Served in Army, U.S. Supreme Court Justice." No mention is made of his many other accomplishments including his service on the Massachusetts Supreme Judiciary Court.

208. Justice Holmes, because of his wide-ranging interests in many areas, including the dismal science, would welcome Brandeis briefs. The Brandeis brief was created by Louis Brandeis while a practicing lawyer. It made its appearance in Muller v. Oregon, 208 U.S. 412, 416 419-20 n.1 (1908).

to law and legal philosophy as presented by Hegel and Kant.[209] He sought to rationalize the nineteenth century American common law, and make it more manageable for practitioners.[210] He also sought to make the law more intellectual.

The rationalization of legal systems was a major task of those engaged in the law in the nineteenth century.[211] Holmes initially was attracted to the logical approach to the law as seen in such jurisprudents as John Austin. He changed his position, however, and ultimately concluded that history and experience (not logic) determine the development of law.

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.[212]

This well-known quote is quintessential Holmes. He recognized the importance of political theories, public policy, and even prejudices as influencing legal rules.[213] Throughout his long and distinguished career as a jurist, philosopher, and writer, he worked to create a pragmatic

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209. Holmes promoted the objective reality of the law, as he believed that the subjectivity found in Kant and other contemporary philosophers would undermine many legal sanctions. Kant, for instance, could not tolerate the notion of using a human being as a means to an end. Holmes believed that even a good man should be punished if he broke the law. In this instance, a man is being used as a means of forcing compliance for the good of order. Kant believed such punishment immoral.

210. Where was Gaius when we needed him? It was the Roman law problem all over again. The *Digests* were not indexed and were indecipherable. The sprawling, burgeoning growth of the common law presented nineteenth century practitioners with the same dilemma.

211. In New York State, the Field Code was the result of this movement. Note that in Europe, codification, based on the Code Napoleon and Roman law influences, was in full swing. Holmes's *The Common Law* was written in opposition to the intellectual attraction to Roman-based civil law, and to establish a systematic framework for understanding the superiority of the common law.

212. HOLMES, JR., *supra* note 78, at 1.

213. His understanding of the role of judges' predispositions, intuition, and public policy would make him at home with modern legal realists and Critical Legal Studies. His creation of a legal structure based upon the reasonable man, his assignment of fault and responsibility, and his use of objective standards would make him less welcome with Critical Legal Studies, which would assign bias and subjectivity to Holmes's objective reality.

legal system that would respond to the needs of society in the manner of the common law.

In the twentieth century, Karl Llewellyn (1893-1962) brought his great breadth of mind to the legal pragmatism of Holmes and humanized it.[214] Roscoe Pound (1870-1964) continued to study how judges made law.[215] Pound focused on social engineering, interest analysis, and impact analysis. Pound was unwilling to retreat to a narrow jurisprudence. In his American Pragmatist view, he saw the law as wrapped up in ethics, economics, and social engineering.

Modern legal theory has evolved from the logical analysis of Austin and Christopher Columbus Langdell, who attempted to order the law according to strictly perceived "scientific" principles.[216] As seen earlier, Holmes saw the common law as essentially pragmatic and dynamic in approach.

Pound and Llewellyn made legal realism creative.[217] They saw an open policy decision-making where knowledge of the legal rules was insufficient. The *judges'* considerations assumed greater importance as they "found" and declared the law. However, the judges were not unfettered. Their decisions must be grounded in, and comport to, reality.

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214. Professor Donnelly assigned KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE (1962), and WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, *Situations, Sources and the Uniform Commercial Code* (1973).

215. For a brief overview of Pound *see* Samuel J.M. Donnelly, *Roscoe Pound: Philosopher of Law*, 3 HOFSTRA L. REV. 899 (1975) (book review).

216. Law continued to use the "scientific" metaphor well into the twentieth century. The library is still a "laboratory" at law schools (although clinical programs and simulations have expanded the architecture of the lab). American legal education in the first year still employs the Langdellian case method, where students are taught to "read the cases" to discern the legal principles found therein. A certain amount of confusion reigns when novices discover that the rules are not hard and fast, and that the law is much more open-textured than they had initially been led to believe.

217. Remember that Llewellyn was the principal draftsman of the 1929 Uniform Trust Receipts Act, and labored on the Uniform Commercial Code in the 1930s.

Llewellyn's work is analogous to Holmes's, who believed that general principles do not decide concrete cases. In the Uniform Commercial Code (U.C.C.), particular rules govern particular commercial situations. There is no attempt to fashion general, overarching principles. Llewellyn's drafting is very different from the old Uniform Sales Act, which had relatively simple concepts that were very difficult to apply to cases. For example, his approach to the risk of loss in the U.C.C. exemplifies his pragmatism and its link to Holmesian thought. U.C.C. Section 2-205 has very specific and complex rules for the allocation of risk of loss. Although the beauty of grand general principles is not easily discerned, courts and merchants can discover quickly the rules applicable to their cases.

Did the rule apply to the situation? Knowledge of the reality yields the key to the purpose of the rule, which leads to the proper result. This is the practice of the common law of Holmes in the grand tradition.

We began with the Talmud and saw it as living text that spoke through many generations. Talmud's argument and rhetoric permitted Jews to create legal solutions for their times and to preserve Jewish law and culture. The works of Holmes, Llewellyn, and Pound showed how in the twentieth century we have come to use the open-textured common law to fashion flexible rules for our dynamic society and its human needs and problems.[218]

II. Undergraduate Legal Classics

A. Suggestions for Teaching Undergraduate Legal Classics

The objectives of the undergraduate version of *Legal Classics* remain largely the same as the law school or graduate school course.[219] Exposure to eloquent and thoughtful writers helps to develop better and more critical writers. The authors selected help place great legal and moral thought in its own times.[220] Unlike many survey courses where exposure is limited and materials are often presented by secondary sources, *Legal Classics* requires students to immerse themselves in the original text (or

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218. Llewellyn and his disciples are less text-oriented and place greater emphasis upon human beings and the patterns of their relationships. The concern is not for the rule qua rule, but for the people invoking the law. The rule is the tool for relating the judge, as the decision-maker, to the people and problems before the court.

219. Blackstone perhaps best summarized the reasons for studying the law:

> And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws. A land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution. This liberty, rightly understood, consists in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As therefore every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as the inconvenience, of living in society without knowing the obligations which it lays him under.

Commentaries, Book I, *supra* note 96, at 6 (citations omitted).

220. *See infra* Tables 3, 4 for the proposed undergraduate syllabus and schedule.

a good translation).[221] Thus, students have to grapple with the writers themselves and draw their own conclusions, rather than rely upon what the professor or scholar critiquing the work thinks.[222] Contact with great legal minds and writers hones reasoning skills. The research paper component, if a small class is offered, develops abilities in writing, research, and analysis.

Legal Classics could be offered as a team-taught class or seminar as we offered our law students at Syracuse.[223] It could be structured as a large class or lecture where the professor meets twice a week and is assisted by teaching assistants (law or government graduate students) who cover the third study section.[224] As a large class, two short papers and a final exam, or a mid-term and a final, might prove most manageable. If the class were a small one taught solely by the faculty member, two short papers (five to ten pages in length) and a final research paper might be required.[225]

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221. Some secondary sources, such as Professor Goldie's fine expositions on international law (*see supra* note 90) and Nicholas's introduction to Roman law (*see supra* note 61) are used. They were selected over primary sources because they were well-written and, with a minimum of text, introduced students to basic themes. You will note that the graduate offerings in Roman law (*see infra* Table 1) and international law (*see infra* Table 1) had substantial excerpts from original sources; you may wish to select materials from these offerings or others. Because of space limitations and time constraints, I chose to edit here.

222. Some of the finest courses I experienced at Cornell University were political theory courses taught by Professor Alan Bloom. His teaching remains the inspiration for bringing such a course to undergraduates at Syracuse. I also was fortunate to take additional courses in the philosophy of law and the philosophy of literature. These were some of the most exciting and memorable of my undergraduate years. Most of our students in *Legal Classics* reported that this offering rekindled similar feelings.

223. If team-taught, eventually one of the more foolhardy souls may be emboldened to go it alone as a small class or larger lecture. Even if the solo effort is the first undertaking, the reading lists and anecdotal thoughts about coverage and themes contained in this Article will help in formulating an effective syllabus of your own.

224. At Syracuse, we are fortunate to have a number of law students who have history, English, or political science degrees. They would make ideal candidates for the teaching assistantships. Graduate students in these related disciplines would also be appropriate.

225. For the shorter papers, students might compare selected writings of Daniel Webster and the opinions of Justice Marshall and Justice Story to the writings of Senator John C. Calhoun and Senator Hayne. Another short paper topic would be to compare the views of Blackstone and Burke on prescriptive rights. Such topics could also be turned into examination questions.

B. Comments on the Undergraduate Syllabus

The undergraduate readings are a fairly rigorous introduction to legal thought and are designed for a fourteen week course which meets three hours per week.[226] The readings are approximately 1,300 pages, or about 100 pages per week. The reading assignments may be reduced somewhat without substantial harm to the coverage and themes, should reduction prove to be necessary. Nevertheless, as offered, students in a small class or seminar should be able to do them justice.[227]

The readings begin with Blackstone's assertion that the study of law is appropriate for a liberal education and essential for good citizenship. Study of Talmud provides a good introduction to reading law as text, and provokes consideration of the eternal nature of legal issues. Next, Aristotle presents some keen insights into good government and good citizenship. (Aristotle's ideas reappear in such authors as Aquinas, the great international lawyers, and Blackstone.)

Roman law makes several appearances, as it is the basis for that other great form of Western and world law, *civil law*. The common law is studied through the eyes of a number of thinkers. These writings lead to understanding our modern legal system and our Constitution and its ordered liberties.

International law and Aquinas address natural law themes and the issue of "What is law?" Burke is a great conservative mind, especially worthy of study in this time of revolution and change. The nationalistic conservatism of *The Federalist* sets the American agenda. The Virginia and Kentucky Resolutions and Justice Story illuminate the great American constitutional debate of the nineteenth century. Maine, Unger, and Holmes lead students into modern jurisprudence. The readings conclude with further thoughts about the study of law as a liberal experience.[228]

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226. *See infra* Table 4.

227. When I set about the task of editing materials for undergraduates, I used my undergraduate experiences at Cornell, my seven years of teaching undergraduates at The Wharton School, the University of Pennsylvania, and conversations with several graduate assistants in the history program at the Maxwell School of Citizenship to guide me.

228. The schedule is somewhat different from the previous law offerings at Syracuse. In reality, strict chronological presentations in the classroom were tempered occasionally by faculty scheduling conflicts.

Blackstone's essay on teaching law to undergraduates seems a fitting place to start. He was a wonderful writer, one of whom many undergraduates will have heard, and of

III. Conclusion

It is hoped that your appetite for the teaching of great Western legal works to law students and undergraduates has been whetted.[229] *Legal Classics* offers great and lucid writing. The course has developed and enhanced legal wr'ting, legal research, and legal thought at Syracuse University College of Law.

The suggested texts expose faculty and students to important ideas, and allow them to trace the development of Western legal thought.[230] They reacquaint participants with moral issues and great choices. *Legal Classics* invites professors and students to study the moral and theoretical underpinnings of our system of laws, to contemplate the choices not made, and to revel in the beauty of the language and thought.

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major importance to American common law and constitutional thought.

Aristotle's *Politics* is included because Aristotle was a superb writer and a well-organized one. Students can see readily how the scholastic thinkers of the Middle Ages adopted Aristotle for their philosophic model. Further, he expressed important ideas on the nature of political life and citizenship. His categories of government influenced Montesqueiu and Blackstone, to name two. His observations about republics and democracies were on the minds of the American founders.

Aquinas will give students a feeling for medieval political and moral philosophy. Through him, students see Aristotelian thought at work, transmuted by a brilliant medieval mind. Aquinas permits students to think about the connection between morality and the law. (For Aquinas, law had to be moral and good or else it was not law.) Students can draw comparisons to legal positivist thought and modern debates about the morality of law.

Holmes's *The Common Law* could be substituted for R.C. van Caenegem's *The Birth of English Common Law*. If that substitution were to be employed, the order would be changed to reflect it. I chose to put Holmes in the modern era and to use him for his modern, objective observations, rather than follow a purely chronological approach for topics covered.

229. Ironically, this Article presents exactly what we deliberately sought to avoid: second-hand discussion of several pillars of Western legal thought without the benefit of in-depth exposure to the texts. The author and his collaborators encourage readers to keep foremost in mind that excitement and learning in class sessions (and the inspiration for this Article) were generated by the actual living texts that still influence the law today.

230. In completing this Article, certain themes leaped to life as I reviewed the texts and my class notes. It may seem that we embarked with an agenda and set about to structure a curriculum that traced ideas of complexity, legitimacy of power, growth of bureaucracy, sanctions, and prescriptive rights and their relationship to common law liberties. We did not do this expressly—my memory and the discipline of writing undoubtedly helped order the themes. The selected readings we used ultimately revealed patterns in the evolution of Western law.

The study of *Legal Classics* offers the possibility of improving the quality of political, moral, and legal rhetoric. Compare *The Federalist*,[231] *Common Sense*,[232] *Rights of Man*,[233] and *Lincoln's First Inaugural Address*[234] to "Family Values" and the talk of God being bandied about by every hack politician.[235] Thirty-second sound bites and cheap slogans have become what passes for political dialogue in our tarnished age. If students appreciated the power and glory of our political and legal language, they might hold themselves and others accountable to a higher standard and ennoble rather than diminish the quality of political life and legal culture. The legal classics offered here will provide a heady and uplifting tonic and a relief from the contemporary bromides of popular culture.

Words are important—too important to be left to the teachers, politicians, and lawyers. Pat Buchanan at the GOP convention frightened many by speaking about a "Cultural War."[236] His conservative attack sent a shudder through me as the phrase "cultural war" reminded me of Hitler's Kulturkampf which ultimately burned books,[237] dissenters, and the Jews. Knowledge of our history will forewarn us. We cannot continue to make heinous mistakes and survive as a people or species.

Karl Marx said history repeats as farce.[238] The great thinker erred. In our century, we have had awful repetitions—the Turkish genocide of Armenians,[239] the Holocaust, the Gulag, the millions who died in the

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231. *See supra* note 22.

232. THOMAS PAINE, COMMON SENSE (1776), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE (Philip S. Foner ed., The Citadel Press 1969) (1945).

233. THOMAS PAINE, RIGHTS OF MAN (1791), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 243 (Philip S. Forner ed., The Citadel Press 1969) (1945).

234. Abraham Lincoln, First Inaugural Address (March 4, 1861), *in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. DOC. No. 101-10, 101st Cong., 1st Sess. 133 (1989).

235. *See, e.g.*, William Safire, *God Bless Us*, N.Y. TIMES, Aug. 27, 1992, at A23; Barbara Ehrenreich, *Why the Religious Right is Wrong*, TIME, Sept. 7, 1992, at 72.

236. *See generally* Pat(rick) Buchanan, Remarks at the Republican National Convention (Aug. 17, 1992), Federal News Service, *available in* LEXIS, NEXIS Library, Current File.

237. "In the words of a student proclamation, any book was condemned to the flames 'which acts subversively on our future or strikes at the root of German thought, the German home and the driving forces of our people.'" WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY 241 (1960).

238. *See supra* note 126.

239. *See* FRANZ WERFEL, THE FORTY DAYS OF MUSA DAGH (DIE VIERZIG TAGE DES MUSA DAGH) (1933).

Peoples Republic of China, the Pol Pot experiment in Cambodia, and now "ethnic cleansing" in the former Yugoslavian territory.[240] Knowing history and our culture does not ensure that there will be no more tragedies—but ignorance of history and thought ensures disaster.

Finally, Americans, especially those of us who are lawyers, comprise an elite group[241] and have a moral duty to understand our common culture, lest we become a people of whom they say: They learned nothing. They knew nothing. They did nothing.[242]

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240. *Cf.* Leslie Gelb, *The Awful Choice on Bosnia*, N.Y. TIMES, Aug. 27, 1992, at A23.

241. American lawyers are our Nation's elite, and have been since before Alexis de Tocqueville made his famous observations in the nineteenth century. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Alfred A. Knopf, Inc. 1960) (1945).

De Tocqueville's observations, despite being well over a century old, are still the best ever written about American culture and politics. *Democracy in America* and *The Federalist* should be studied by all who contemplate holding power or privilege in our society.

242. Talleyrand's famous aphorism about the Bourbons has haunted me, and was responsible for this final concern. The great statesman and observer of human follies noted: *Ils n'ont rien appris, ni rien oublie.* ([Of the Bourbons] They have learned, and forgotten nothing.) Charles Maurice de Talleyrand—Perigord from Chevalier de Panat, letter Mallet du Pan (January 1796), *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 483-84 (Emily Morison Beck ed., 14th ed., 1968).

TABLE 1

Graduate Level *Legal Classics* (as Offered)

Talmud:

Back to the Sources: Reading the Classic Jewish Texts 128-75 (Barry W. Holtz ed., 1984).

Jacob Neusner, Invitation to the Talmud 87-169 (1984).

Abraham Cohen, Everyman's Talmud 298-345 (1932).

Roman Law:

The Institutes of Gaius: Text and Translation 20-123 (W.M. Gordon & O.F. Robinson trans., 1988).

Gaius Noster: Substructures of Western Social Thought, *in* History, Law and the Human Sciences 619-48 (Donald R. Kelly ed., 1984).

Paul Vinogradoff, Roman Law in Medieval Europe (3d ed., 1961).

Early Common Law:

R.C. van Caenegem, The Birth of English Common Law (2d ed., 1988).

International Law:

L.F.E. Goldie, *A Brief Introduction to Grotius, Pufendorf & Vattel* (unpublished manuscript on file with the author) (1988, rev'd 1990).

L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors* 32 Austrl. L.J. 220 (1958).

Samuel Pufendorf, DeJure Naturae Et Gentium Libro Octo, On the Law of Nature and Nations, iii-x, 145-53, 179-309, 825-36, 1292-1341 (James Brown Scott ed., & C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

Monsieur (Emeric) de Vattel, The Law of Nations vii-lv, 3a-9, 13-52, 199-221, 188-91, 235-58, 346-66 (Joseph Chitty, ed., Phil., T. & J.W. Johnson & Co., 1876).

HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1-116, 290-371 (Legal Classics Library 1984) (1625).

Blackstone:

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND Book I, a-161 (Legal Classics ed., 1983) (1765).

Burke:

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Dolphin Books, 1961) (1790).

Federalist Papers:

THE FEDERALIST Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 49, and 51 (James Madison).

The Virginia and Kentucky Resolutions (1798-99):

5 THE FOUNDERS' CONSTITUTION Vol. V. 131-36 (Philip B. Kurland & Ralph Lerner eds., 1987).

Story:

THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614-38 (William W. Story ed., 1952).

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206-65, 282-97, 381-93, Ch. XLII, Sec. 1836-1842 (3d ed., Boston, 1858).

Legal Education:

Roger North, *Discourse on the Study of the Laws*, (ca. 1700-1730), *in* THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 15-33 (Michael H. Hoeflich ed., 1988).

Thomas Wood, *Some Thoughts Concerning the Study of the Law of England in the Two Universities* (1708), *in id.* at 34-52.

Daniel Mayes, *An Address to the Students of Law in Transylvania University* (1834), *in id.* at 145-64.

Maine:

HENRY SUMNER MAINE, ANCIENT LAW, Introduction & 1-237 (London, 1861).

Austin:

JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE (London, 1832).

Durkheim:

EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY xxv-lix, 1-87 (W.D. Halls Trans., 1984).

Weber:

MAX WEBER, LAW IN ECONOMY AND SOCIETY 65-97 (1954).

Unger:

ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 47-133 (1976).

Holmes:

O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

OLIVER WENDELL HOLMES, JR., THE COMMON LAW Introduction, Lecture III (Howe ed., 1963) (1881).

Llewellyn:

KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 42-76 (1962).

WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, *Situations, Sources and the Uniform Commercial Code* (1973).

Pound:

Samuel J.M. Donnelly, *Roscoe Pound: Philosopher of Law*, 3 HOFSTRA L. REV. 899 (1975) (book review).

TABLE 2

Legal Classics: Problems in Law and Literature

Background and Reference: James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (1984).

I. Greek Political and Legal Thought:

Plato and Aristotle considered the ideal political state and the ethics needed to achieve excellence. *Antigone* wrestles with tradition and authority with horrifying consequences. *Agathon* is the tale of a philosopher, Agathon, who is imprisoned for rudely and wisely protesting Kykourgous's fanatical policy of law and order in sixth century B.C. Sparta.

Plato, The Republic (c. 427-347 B.C.)
Aristotle, Politics and Nichomachan Ethics (c. 384-322 B.C.)
Sophocles, Antigone (c. 496-406 B.C.)
John Gardner, The Wreckage of Agathon (1970)

II. The Rise of the State in the Middle Ages:

These readings would encourage students to think about the clash between secular forces of nationalism and religious institutions. Although we take secular society for granted in the West, the achievement of secularism was not without its cost.

R.C. van Caenegem, The Birth of the English Common Law (1973)
Oliver Wendell Holmes, Jr., The Common Law (1881)
Richard Winston, Thomas Becket (1974)
Jean Anouilh, Becket (1960)
George Bernard Shaw, Saint Joan (1924)
Richard Marius, Thomas More (1984)
Robert Bolt, A Man for All Seasons (1962)

III. The Glorious and French Revolutions

The right to revolution. The practical conduct of a revolution and the establishment of a government. Contrast the "conservative" Glorious Revolution with the "radical" and modern French Revolution. Did the English get it right? Or did the French get it wrong?

Thomas Hobbes, The Leviathan (1651)
John Locke, The Second Treatise on Government (1689)
William Blackstone, Commentaries on the Laws of England Book I (1765)
Edmund Burke, Reflections on the Revolutions in France (1790)
Peter Weiss, Marat/Sade (1965)

IV. Utopian Societies

Various ideas about utopia will conclude the study. "Utopia" is blessedly nowhere. The problems of establishing and maintaining a just and productive society are daunting. These readings are especially well-written and thought-provoking.

Karl Marx, The Communist Manifesto (1848)
W. Bruce Lincoln, Passage Through Armageddon: The Russians in War & Revolution 1914-1918 (1986)
Thomas More, Utopia (1516)
John Calvin Batchelor, The Birth of the People's Republic of Antarctica (1983)

TABLE 3

Proposed Undergraduate-Level Legal Classics

Blackstone:

William Blackstone, Commentaries on the Laws of England Book I, a-37 (Introduction on Why Law Is Worthy of Study) (Legal Classics ed., 1983) (1765).

Talmud:

Back to the Sources: Reading of the Classic Jewish Texts 128-75 (Barry W. Holtz ed., 1984).

Aristotle:

Aristotle, Politics Book I., ch. 1-2, Book II, ch. 7-8, Book III (Ernest Barker trans. & ed., 1962).

Roman Law:

Barry Nicholas, An Introduction to Roman Law 1-53 (1962).

Paul Vinogradoff, Roman Law in Medieval Europe (3d ed., 1961).

Early Common Law:

R.C. van Caenegem, The Birth of English Common Law (2d ed., 1988).

Aquinas:

Thomas Aquinas, Treatise on Law, (Summa Theologica, Questions 90-97) (Henry Regnery Company, A Gateway Edition 1965).

International Law:

L.F.E. Goldie, *A Brief Introduction to Grotius, Pufendorf & Vattel* (unpublished manuscript on file with author) (1988, rev'd 1990).

L.F.E. Goldie, *Legal Pluralism and "No-Law" Sectors* 32 Austrl. L.J. 220 (1958).

Blackstone:

William Blackstone, Commentaries on the Laws of England Book I, 38-161 (Legal Classics ed., 1983) (1765).

Burke:

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 13-71, 106-11, 155-58, 166-72, 260-66 (Dolphin Books, 1961) (1790).

Federalist Papers:

THE FEDERALIST Nos. 1, 78 (Alexander Hamilton), Nos. 10, 37, 39, 45, 49, and 51 (James Madison).

The Virginia and Kentucky Resolutions (1798-99): 5 THE FOUNDERS' CONSTITUTION Vol. V:133-36 (Philip B. Kurland & Ralph Lerner, eds., 1987).

Story:

THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 614-38 (William W. Story ed., 1952).

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 206-265, 282-297, 381-393, Ch. XLII, Sec. 1836-1842 (3d ed., Boston, 1858).

Maine:

HENRY SUMNER MAINE, ANCIENT LAW, Introduction, Ch. I, II, & V (London, 1861).

ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 47-133 (1976).

Holmes:

OLIVER WENDELL HOLMES, JR., THE COMMON LAW LECTURES I & III (Legal Classic ed., 1982) (1881).

Legal Education:

Roger North, *Discourse on the Study of the Laws*, (ca. 1700-1730), *in* THE GLADSOME LIGHT OF JURISPRUDENCE: LEARNING THE LAW IN ENGLAND AND THE UNITED STATES IN THE 18TH AND 19TH CENTURIES 15-33 (Michael H. Hoeflich ed., 1988).

Thomas Wood, *Some Thoughts Concerning the Study of the Law of England in the Two Universities* (1708), *in Id.* at 34-52.

Daniel Mayes, *An Address to the Students of Law in Transylvania University* (1834), *in Id.* at 145-164.

TABLE 4

WEEKLY ASSIGNMENTS FOR UNDERGRADUATE LEVEL *Legal Classics*

WEEK 1:	Blackstone	36 pages
	Talmud	47 pages
WEEK 2:	Talmud	
	Aristotle	80 pages
WEEK 3:	Aristotle	
	Introduction to Roman Law	53 pages
WEEK 4:	Introduction to Roman Law	145 pages
	Medieval Roman Law	
WEEK 5:	Early Common Law	110 pages
WEEK 6:	Aquinas	116 pages
	Founders of Modern International Law	35 pages
WEEK 7:	Mid Term	
	Blackstone	123 pages
WEEK 8:	Burke	80 pages
WEEK 9:	Federalist Papers	75 pages
WEEK 10:	State Sovereignty v. Nationalism	126 pages
WEEK 11:	Maine	100 pages
WEEK 12:	Unger	85 pages
WEEK 13:	Holmes	90 pages
WEEK 14:	Common Law Legal Education	60 pages

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NOTES

Operation Rescue's Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (a/k/a the Ku Klux Klan Act)*

ELIZABETH A. ROBERGE**

"'[The] disorders are so great in some of the states as to paralyze the power of local authorities.'"

— James N. Tyner (Republican-Indiana, 1871)[1]

INTRODUCTION

Ever since the controversial decision of *Roe v. Wade*[2] recognized that a woman's constitutional right to privacy includes the right to terminate a pregnancy in its early stage, confrontations between those labeling themselves "pro-choice" and "pro-life" have escalated. Between

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* Editor's Note: After this issue of the *Indiana Law Review* went to press, the United States Supreme Court announced its decision in a pivotal case discussed in this Note, Bray v. Alexandria Women's Health Clinic, No. 90-985, 1993 Lexis 833 (Jan. 13, 1993). In five separate opinions, a five-to-four majority ruled that 42 U.S.C. § 1985(3) may not be invoked to enjoin anti-abortion rescue blockades. The *Bray* case is discussed *infra* at notes 52-74 and 131-32, and accompanying text.

Notwithstanding the Court's recent ruling in *Bray*, we believe that this Note will be of value to those interested in the modern application of § 1985(3).

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1. Robert Abrams, *Justice Department is Wrong in Wichita*, NEWSDAY (N.Y.), Sept. 9, 1991, at 39 (quoting James N. Tyner from the Congressional debates regarding the enactment of the Ku Klux Klan Act).

2. 410 U.S. 113 (1973), *modified*, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), *modified*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

1977 and 1990, there were "829 acts of anti-choice violence, including 34 clinic bombings, 52 clinic arsons, 266 [clinic] invasions, 64 assaults and batteries, 2 kidnappings, 22 burglaries, 77 death threats, and 269 incidents of vandalism."[3] Not surprisingly, the violence resulting from this emotional issue has not been one-sided.[4] In the summer of 1991, another chapter was added to the ongoing saga when the nation's attention turned to events occurring in Wichita, Kansas.

On July 15, 1991, a national pro-life organization known as Operation Rescue began a series of anti-abortion protests in the midwestern city. The organization specifically targeted Wichita because it was the home of one of the few clinics in the nation that performed third-trimester abortions.[5] Conducting what the organization termed "rescue missions," members of Operation Rescue created human blockades to prevent access to several local abortion clinics.[6] Within seven weeks, approximately 2,700 arrests of protesters were made;[7] the city and county governments expended approximately $800,000 in responding to the demonstrations;[8] a federal judge, Patrick Kelley, was thrust into the limelight of the national media;[9] and the United States Department of Justice and President Bush had contributed their views to the controversy.[10] Emerging from the center of the turmoil was a potent legal issue—whether a 120-year-old federal civil rights law could be applied to enjoin the clinic blockades.

Inspired by political turmoil and violence against the newly freed slaves following the Civil War, Congress enacted the Civil Rights Act

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3. Celeste Lacy Davis & Eve W. Paul, *Operation Rescue: Was the Justice Dept. Right to Intervene in Wichita?*, A.B.A. J., Nov. 1991, at 44, 45.

4. *See, e.g.*, Mimi Hall, *Abortion Foes Copy Wichita Protest*, USA TODAY, Sept. 16, 1991, at 3A (Wichita abortion clinic director arrested after she hit two protesters); Richard Lacayo, *Crusading Against the Pro-Choice Movement*, TIME, Oct. 21, 1991, at 26-27 (Operation Rescue's Randall Terry described the violence against his followers: "'[O]ur people have had their limbs broken, women have been sexually molested by prison guards, Mace has been used on nonviolent demonstrators . . . . In some jurisdictions the police have systematically tortured people . . . . When you have police pushing their knuckles into people's eye sockets or lifting people up by their jawbones, that's agonizing'").

5. *Abortion Foes Told to Leave Wichita*, L.A. TIMES, Aug. 31, 1991, at A24.

6. Lacayo, *supra* note 4, at 28.

7. *Anti-Abortion Arrests*, NEWSDAY (N.Y.), Sept. 8, 1991, at 16. Many of the protesters were arrested more than once; these 2,700 arrests involved an estimated 1,700 people. *Id.*

8. *Kansas*, USA TODAY, Sept. 24, 1991, at 8A.

9. *See, e.g.*, William Bradford Reynolds, *Judicial Excess in Wichita*, N.Y. TIMES, Sept. 1, 1991, § 4, at 11.

10. *See, e.g.*, Abrams, *supra* note 1, at 39; Gary Lawson, *Operation Rescue: Was the Justice Dept. Right to Intervene in Wichita?*, A.B.A. J., Nov. 1991, at 44. *See infra* notes 16, 18.

of 1871.[11] Since its inception, the Act, commonly known as the Ku Klux Klan Act, has been the subject of divisive debate regarding its constitutionality and scope.[12] The civil conspiracy section of the Act provides, in pertinent part:

> If two or more persons . . . conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or of equal privileges and immunities under the laws, . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages . . . .[13]

District Court Judge Patrick Kelley invoked this Section to issue a preliminary injunction, enjoining Operation Rescue's blockading activities in Wichita.[14] In the aftermath of his decision, Judge Kelley found himself

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11. Steven F. Shatz, *The Second Death of 42 U.S.C. Section 1985(3): The Use and Misuse of History in Statutory Interpretation*, 27 B.C. L. Rev. 911 (1986).

12. *Id.*

13. 42 U.S.C. § 1985(3) (1988). The complete Section provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Id.

14. *Women's Health Care Serv., P.A. v. Operation Rescue-Nat'l*, 773 F. Supp. 258 (D. Kan. 1991) (Judge Kelley cited 13 prior federal cases passing on the applicability

to be the focus of considerable attention. He was criticized, on one hand, for exceeding his authority[15] and improperly invoking the federal statute.[16] On the other hand, he was praised for protecting the rights of women through the invocation of federal law[17] and for standing firm against pressure from the Department of Justice to adopt a narrow interpretation of the statute.[18]

This Note explores the history, scope, and contemporary applications of the civil conspiracy section of the Ku Klux Klan Act, with a particular focus on: (1) whether it is available to protect the rights of women seeking abortion-related services and the clinics that provide those services, and (2) the reasoning which supports its application against those conducting the rescue missions.[19]

I. A Brief History of 42 U.S.C. § 1985(3)

Following the conclusion of the Civil War and the emancipation of slaves in the United States, the Ku Klux Klan and similar organizations waged a widespread campaign of intimidation and violence in an effort to turn back the changes brought about during the Reconstruction Era.[20]

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of 42 U.S.C. § 1985(3) to anti-abortion clinic blockades, 10 of which granted relief under the Section. The court endeavored to enjoin the blockading activities without enjoining Operation Rescue's legitimate First Amendment rights to protest the provision of abortion-related services.) For a discussion of the reasoning underlying the invocation of the equitable remedy of an injunction when the statute specifies "damages," see *infra* notes 72-74 and accompanying text.

15. *See, e.g.*, Lawson, *supra* note 10, at 44; Reynolds, *supra* note 9, § 4, at 11 (Judge Kelley operated outside the boundaries set by Congress); *Lessons of a Summer of Abortion Protests: Two Sides in Wichita See Hard Times Ahead*, Wash. Post, Aug., 26, 1991, at A1 (Operation Rescue "denounced [Judge Kelley] for using 'Gestapo-style terrorist tactics.' They called him a 'loose cannon' and a 'Lone Ranger'.").

16. *See, e.g.*, Lawson, *supra* note 10, at 44; Abrams, *supra* note 1, at 39 (Bush administration argued in Department of Justice brief that Ku Klux Klan Act did not apply to Wichita facts); Reynolds, *supra* note 9, § 4, at 11 (Ku Klux Klan Act did not apply in the Wichita case as "[a]bortion is not mentioned. Nor have the Wichita protesters discriminated against a class; they oppose all who aid abortion.").

17. *See, e.g.*, Davis & Paul, *supra* note 3, at 45; *The Wichita Demonstrations*, Wash. Post, Aug. 27, 1991, at A22 (arguing that members of Operation Rescue must accept the consequences of their acts); John Elson, *The Feds vs. a Federal Judge*, Time, Aug. 19, 1991, at 22 (Abortion-rights advocates expressed support for Judge Kelley's order to federal marshals to get tougher on demonstrators violating his blockade-injunction).

18. *See, e.g.*, Davis & Paul, *supra* note 3, at 45 (characterizing Judge Kelley's ruling in the Wichita case as "courageous" in light of the Department of Justice's urging that the ruling be reversed).

19. This Note does not address whether abortion itself should be legal.

20. Shatz, *supra* note 11; Mark Fockele, *A Construction of Section 1985(3) in Light of Its Original Purpose*, 46 U. Chi. L. Rev. 402 (1979). Other organizations active and similar in purpose to the Ku Klux Klan included the Knights of the White Camelia,

Reported incidents included murders and whippings,[21] as well as Klan members "terrifying the colored population, and putting whole neighborhoods in fear so that the Ku Klux [could] control an election."[22] In response to the confirmation of these and similar reports, President Grant dispatched a message to the 42nd Congress on March 23, 1871, requesting immediate legislation to deal with the ongoing political terrorism.[23] Acting on the President's request, Representative Shellabarger introduced a bill titled "An Act to Enforce the Fourteenth Amendment and for other Purposes," which was quickly enacted as the Ku Klux Klan Act.[24] Section 1 of the Act dealt with the enforcement of the Fourteenth Amendment and formed the basis of today's 42 U.S.C. § 1983.[25] Section 2 of the Act provided civil and criminal penalties designed to deal with conspiratorial lawlessness of the sort engaged in by the Klan.[26] By 1883, however, the Supreme Court had issued a series of opinions which effectively invalidated Section 2 of the Act.[27] For the

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the White Brotherhood, the Pale Faces, and the '76 Association. *Id.* at 407-08 (citing KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION 199 (1965)). *See also* Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3)*, 64 TEX. L. REV. 527 (1985) (presenting a highly detailed and descriptive account of the events leading up to the enactment of § 1985(3), as well as the legislative history of the Section).

21. Fockele, *supra* note 20, at 408 (quoting the majority report of the Senate Select Committee to Investigate Alleged Outrages in the Southern States, H.R. Rep. No. 1, 42d Cong., 1st Sess. xxx-xxxi (1871)).

22. *Id.* at 409 (quoting Congressman Stoughton during the Congressional debates on the enactment of the Ku Klux Klan Act. CONG. GLOBE, 42d Cong., 1st Sess., at 517 (1871)).

23. Shatz, *supra* note 11, at 913.

24. Ku Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871), CONG. GLOBE, 42d Cong., 1st Sess., at 914. The Ku Klux Klan Act, the Civil Rights Act of 1871, and the Force Act of 1871 are all phrases that have been used to describe the Act. Fockele, *supra* note 20, at 402 n.1. The official popular name, according to the Popular Names Table of the United States Code Service, is the Ku Klux Act. This Note uses the phrases "the Ku Klux Klan Act" or "the Act" to describe the subject legislation, and "42 U.S.C. § 1985(3)" or "§ 1985(3)" to describe the civil conspiracy section with which this Note is concerned.

25. Shatz, *supra* note 11, at 914. The text of § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

26. Shatz, *supra* note 11, at 911.

27. *Id.* at 911-12 (citing Civil Rights Cases, 109 U.S. 3 (1883); United States v.

next 100 years, Section 2, the civil conspiracy portion of which is codified at 42 U.S.C. § 1985(3), remained essentially dormant.[28]

During this period, the Supreme Court heard only one case brought under the civil conspiracy statute: *Collins v. Hardyman*.[29] In *Collins*, the Court rejected the plaintiff's private conspiracy claim, holding that the Section reached only conspiracies under color of state law, and expressing serious doubts whether Congress had the power to enact such a broad statute.[30]

In 1971, however, § 1985(3) was given new life with the Supreme Court's decision in *Griffin v. Breckenridge*.[31] The plaintiffs in *Griffin*, described as "Negro citizens of the United States,"[32] brought an action under § 1985(3) alleging they had been passengers in an automobile driven by a white male who was mistaken by the defendants as a civil rights worker. The plaintiffs claimed that they were traveling in the area of DeKalb, Mississippi, when the defendants, white males, "conspired, planned, and agreed to block the passage of said plaintiffs . . . to stop and detain them and to assault, beat and injure them with deadly weapons."[33] The plaintiffs further alleged that the defendants intended to deprive them and other black Americans of the enjoyment of equal protection, equal rights, and privileges and immunities under the laws of the United States and the State of Mississippi. The district court dismissed the complaint based on *Collins*, and the court of appeals affirmed the dismissal.[34] The Supreme Court granted certiorari in *Griffin* "to consider questions going to the scope and constitutionality of 42 U.S.C. § 1985(3)."[35]

After reviewing the legislative history of the Section, the Court found that the allegations in the plaintiffs' complaint brought them squarely within the language of § 1985(3) and that, contrary to the serious doubts expressed in *Collins*, Congress *did* have the constitutional power to enact the statute. The Court upheld the plaintiffs' complaint, stating:

Cruikshank, 92 U.S. 542 (1875); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872)). In United States v. Harris, 106 U.S. 629 (1883), the Court invalidated the criminal portion of Section 2, ruling that it was unconstitutional, on grounds which appeared equally applicable to the civil portion of the Section. Shatz, *supra* note 11, at 916.

28. Shatz, *supra* note 11, at 912. According to Shatz, during this period, the civil conspiracy portion of the Act was "invoked infrequently."

29. 341 U.S. 651 (1951). *See* Shatz, *supra* note 11, at 916.

30. *Collins*, 341 U.S. 651.

31. 403 U.S. 88 (1971). *See* Shatz, *supra* note 11, at 912.

32. *Griffin*, 403 U.S. at 89.

33. *Id.* at 90.

34. *Id.*

35. *Id.* at 93.

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.[36]

The Court broke down the requisite elements of a § 1985(3) claim based on the language of the statute:

> (1) a conspiracy;
> (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;
> (3) an act in furtherance of the conspiracy; and
> (4) an injury to person or property, or a deprivation of having and exercising any right or privilege of a citizen of the United States.[37]

The Court noted that because "the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of the statute, there has been no occasion here to trace out its constitutionally permissible periphery."[38]

The next landmark Supreme Court case interpreting § 1985(3) was the case of *United Brotherhood of Carpenters v. Scott*.[39] *Scott* involved a dispute between union and nonunion workers. The plaintiffs, construction workers and the nonunion company that hired them, brought an action under § 1985(3) alleging that the defendants, the trades council, its unions, and union members, had deprived them of their legally protected rights. The defendants allegedly engaged in violence and vandalism, injuring the individual plaintiffs and delaying the construction project at the center of the dispute. Relying in part on the *Griffin* case, both the district court and the court of appeals upheld the plaintiffs'

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36. *Id.* at 102.
37. *Id.* at 102-03.
38. *Id.* at 107.
39. 463 U.S. 825 (1983). *See* Shatz, *supra* note 11, at 912. The Court had also decided the case of Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366 (1979). The Court held in *Novotny* that a claim based on a deprivation of a right created by Title VII of the Civil Rights Act of 1964 could not be brought under § 1985(3) because a contrary holding would permit the avoidance of Title VII's administrative process. *Id.* at 378. The case is of lesser significance than *Griffin* or *Scott* with respect to the scope of § 1985(3) generally; the dicta in *Novotny*, however, takes on added import in light of the recent line of anti-abortion blockade cases. *See infra* notes 119-31 and accompanying text.

cause of action. The court of appeals held that "1985(3) reached conspiracies motivated either by political or economic bias."[40] In a five-to-four decision, the Supreme Court reversed the lower courts. The majority found "no convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities."[41]

In reviewing the legislative history of § 1985(3), Justice White, writing for the majority, cited the words of Senator Edmunds, a member of the 42nd Congress, which supported the adaptation of a broad view of the statute: "He said that if a conspiracy were formed against a man 'because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.'"[42] As in the *Griffin* case, however, notwithstanding the statement of Senator Edmunds, the majority declined to render an opinion on the breadth of § 1985(3) beyond its narrow holding that the statute did not protect a group united solely by economic or commercial interests.[43] The majority left open the possibility, however, that the statute might reach private conspiracies "aimed at any class or organization on account of its political views or activities, or at any of the classes posited by Senator Edmunds . . . ."[44]

Writing for the four dissenting justices in *Scott*, Justice Blackmun addressed the economic aspects of the political turmoil which inspired the enactment of § 1985(3). Justice Blackmun wrote: "Congress' [sic] answer to the problem of Klan violence—a problem with political, racial, and economic overtones—was to create a general federal remedy to protect classes of people from private conspiracies aimed at interfering with the class members' equal exercise of their civil rights."[45] Justice

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40. *Scott*, 463 U.S. at 830.

41. *Id.* at 837. Shatz described the majority's opinion as "a mortal blow" to § 1985(3), despite its narrow holding and dearth of analysis. *See* Shatz, *supra* note 11, at 912, 923.

42. *Scott*, 463 U.S. at 836-37 (quoting CONG. GLOBE, 42d Cong., 1st Sess., at 567 (1871)).

43. Justice White noted that in *Griffin* the Court "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments . . . ," *id.* at 837, and that it chose to "follow the same course here." *Id.* Justice White also wrote "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *Id.* The majority also held that a claim of conspiracy to violate First Amendment rights is not successfully asserted without evidence of state involvement. *Id.* at 833.

44. *Scott*, 463 U.S. at 837.

45. *Id.* at 853 (Blackmun, J., dissenting). Justice Blackmun was joined in his dissent by Justices Brennan, Marshall, and O'Connor.

Blackmun expressed the view that the statute was designed to protect those classes that were in danger of not being ensured equal protection of the laws by the local authorities. Further, "certain class traits, such as race, religion, sex, and national origin, *per se* meet this requirement, [and] other traits also may implicate the functional concerns in particular situations."[46] Justice Blackmun emphasized that the Court's modern approach to the interpretation of Reconstruction civil rights statutes had been to give them "'a sweep as broad as [their] language.'"[47] The dissenters found no reason to abandon that approach, and described the majority's interpretation of § 1985(3) as "crabbed and uninformed."[48]

Following the *Griffin* and *Scott* decisions, the interpretation and application of § 1985(3) has been inconsistent in the lower federal courts.[49] Neither the *Griffin* decision nor the *Scott* decision offered tangible guidelines for the proper modern uses of the statute. *Griffin* essentially concluded that because the facts in the case were so close to the events precipitating the enactment of § 1985(3), the plaintiffs' claim should be sustained. *Scott*, on the other hand, summarily eliminated classes defined solely by economic or commercial concerns from the realm of protected groups, without ruling on what other groups might fall within the Section's protection. Thus, the lower courts have been left to apply their own interpretation of the scope of § 1985(3).

II. The Application of 42 U.S.C. § 1985(3) to Enjoin Anti-Abortion Rescue Blockades

Beginning in the late 1980s, a series of cases in which the plaintiffs sought protection under § 1985(3) from anti-abortion clinic blockades began percolating through the lower federal courts.[50] In the majority of

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46. *Id.*

47. *Id.* at 854 (quoting Griffin v. Breckenridge, 403 U.S. 88, 98 (1971) (quoting United States v. Price, 383 U.S. 787, 801 (1966))).

48. *Id.*

49. *See* Shatz, *supra* note 11, at 926-28. *See also* Gormley, *supra* note 20, at 550-64.

50. *See, e.g.*, Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Or. 1988) (§ 1985(3) protects the right of travel, including the right to travel interstate to have an abortion, from encroachment by private conspiracies; women exercising their constitutional right to privacy by choosing to have an abortion are a protected class under § 1985(3)); New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989) (deciding that conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under § 1985(3)); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989) (deciding that women seeking abortions are a class under § 1985(3), and a conspiracy to deprive these women of their constitutional rights is actionable under § 1985(3)); Southwestern Medical Clinics of Nev., Inc. v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989) (granting a preliminary injunction enjoining

these cases, the plaintiffs, typically medical clinics that provide abortion-related services and organizations seeking to protect their members' rights to obtain an abortion, received relief by successfully asserting a private conspiracy claim under § 1985(3).[51]

A. Cases Granting Relief Under § 1985(3)

Thirteen cases involving anti-abortion protesting and clinic confrontations were reviewed for this Note. In all but three of these cases, the plaintiffs were granted relief under § 1985(3).[52] The case of *National Organization for Women v. Operation Rescue*, recently argued before the Supreme Court as *Bray v. Alexandria Women's Health Clinic*,[53] exemplifies the underlying facts and the legal issues found in this group

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anti-abortion clinic blockades under § 1985(3)); Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989) (deciding that women seeking abortions constitute a protected class under § 1985(3)). One of the first cases to link § 1985(3) to the abortion debate was Northern Va. Women's Medical Ctr. v. Balch, 617 F.2d 1045 (4th Cir. 1980), in which the court of appeals upheld the district court's injunction prohibiting anti-abortion blockades on pendent jurisdiction grounds, citing § 1985(3).

51. This was the same conclusion reached by Judge Kelley after reviewing the cases to date. Women's Health Care Serv. v. Operation Rescue-Nat'l, 773 F. Supp. 258 (D. Kan. 1991). Of the numerous § 1985(3)/clinic blockade cases surveyed for this Note, the plaintiffs were denied relief in only three cases: Roe v. Abortion Abolition Soc'y, 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987) (denying relief under § 1985(3) on grounds that class-based animus was not established); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989) (finding no discriminatory animus against women because anti-abortion protesters confronted all groups associated with the clinic including men, women of all ages, doctors, nurses, staff, and female security guards); National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989) (finding that a valid class was established but relief was denied on grounds that abortion seekers have never been designated as a class needing special protection). Cases in which the plaintiff(s) were granted relief under § 1985(3) include those cases set forth *supra* note 50, as well as: NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990) (finding private conspiracy to deprive women seeking abortions of their right to travel actionable under § 1985(3)); Lewis v. Pearson Found., Inc., 908 F.2d 318 (8th Cir. 1990) (declaring women seeking abortions to be a protected class under § 1985(3); class-based discriminatory animus established because defendants operated a mock abortion clinic in order to prevent abortions); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (deciding that women constitute a protected class under § 1985(3); injunction prohibiting anti-abortion clinic blockades was upheld). *See also* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3rd Cir. 1989) (upholding an injunction prohibiting anti-abortion clinic blockades on interference with contract grounds).

52. *See supra* notes 50-51.

53. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

of cases. The plaintiffs in *Bray* were several clinics that provided abortions and abortion-related services, and several organizations suing on behalf of themselves and their members, including the National Organization for Women. The defendants included the organization Operation Rescue (an unincorporated association of individuals opposed to abortion), and several individuals opposed to abortion, including Randall Terry, the National Director and founder of Operation Rescue.[54] The plaintiffs brought an action in the district court, requesting a permanent injunction to enjoin the defendants from conducting abortion clinic blockades.

The district court found that the defendants "agreed and combined with one another . . . to organize, coordinate and participate in 'rescue' demonstrations at abortion clinics in various parts of the country,"[55] and that Operation Rescue's own literature defined a "rescue" as "'*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims.'"[56] The court further found that Operation Rescue had three primary goals in conducting the clinic blockades: (1) to prevent abortions, (2) to persuade women not to obtain abortions, and (3) "to impress upon members of society the moral righteousness and intensity of their anti-abortion views."[57] Testimony adduced at trial established that the human blockades effectively prevented patients, prospective patients, and medical staff from entering and exiting the clinics, and created a substantial risk of physical and emotional harm to the patients. It also was established that one of the clinics, Commonwealth Women's Clinic, had been the target of these rescue demonstrations almost weekly for five years. Signs and fences were damaged during one of the largest of these demonstrations and nails were strewn across the nearby parking lots and public streets. During the particular demonstrations at issue in *Bray*, in addition to the disruptions common to rescue missions generally, five women who had commenced a multistage abortion process were prevented from entering the clinic to undergo laminaria removal.[58] This subjected the women to a substantial risk of infection, bleeding, and other potentially serious complications.

The plaintiffs brought several state and federal claims, including two claims for relief under 42 U.S.C. § 1985(3).[59] In analyzing the plaintiffs'

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54. Defendants Jayne Bray and Michael Bray were individuals who organized and coordinated "rescue" operations in the Washington Metropolitan area. Jayne Bray was arrested on October 29, 1988, for her activities as an anti-abortion rescue demonstrator.

55. *Operation Rescue*, 726 F. Supp. at 1488.

56. *Id.* at 1488 (citations omitted).

57. *Id.*

58. The removal of a cervical dilation device.

59. In addition to their § 1985(3) claims, plaintiffs also brought state-law claims based on trespass, public nuisance, and tortious interference with business relationships.

§ 1985(3) claims, the district court first enumerated the requisite elements of a claim brought under the private conspiracy statute as set forth in *Griffin*.[60] In examining whether the first element, the existence of a conspiracy, was satisfied, the court noted that a conspiracy has been defined as "'a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.'"[61] Based on this definition, the district court found the existence of a conspiracy among the defendants. The court then addressed the second element of "purpose," and noted a prior Fourth Circuit case, *Buschi v. Kirven*,[62] which stated that the "purpose" element requires that "the conspiracy be 'motivated by a specific class-based, invidiously discriminatory animus.'"[63] Rejecting defendants' claim that a sex-based animus does not satisfy § 1985(3)'s "purpose" element, the court again cited *Buschi* for the proposition that a class defined by such immutable characteristics as race and sex will satisfy the class-based, invidiously discriminatory animus requirement.[64] Thus, the court concluded, a conspiracy to deprive women seeking abortions of their constitutionally protected rights was actionable under § 1985(3).[65]

The court then turned to an examination of those constitutional rights of which the plaintiffs claimed to be deprived, specifically, the right to travel and the right of privacy. Citing the Supreme Court case of *Doe v. Bolton*,[66] which held that a requirement of in-state residency as a prerequisite to obtaining an abortion violated the right to travel, the court first held that Operation Rescue's clinic blockades deprived women who travel interstate to obtain abortions their constitutional right to travel.[67] The court found § 1985(3)'s "act in furtherance of the

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60. *Operation Rescue*, 726 F. Supp. at 1492 (citations omitted). For a discussion of *Griffin*, see supra notes 31-38 and accompanying text.

61. *Id.* at 1492 (quoting 3 EDWARD J. DEVITT, FEDERAL JURY PRACTICE & INSTRUCTIONS § 103.23 (1987) (citing MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962))).

62. 775 F.2d 1240 (4th Cir. 1985).

63. *Operation Rescue*, 726 F. Supp. at 1492 (quoting Buschi v. Kirven, 775 F.2d 1240, 1257 (4th Cir. 1985)). The Supreme Court first delineated this requirement in Griffin v. Breckenridge, 403 U.S. 88 (1971) (declaring that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action). *See supra* notes 31-38 and accompanying text.

64. *Operation Rescue*, 726 F. Supp. at 1492.

65. *Id.* at 1493.

66. 410 U.S. 179 (1973).

67. *Operation Rescue*, 726 F. Supp. at 1493. The court also held that because the right to interstate travel is protected from both private and governmental interference, the plaintiffs were not required to make a showing of state action. *Id.* (citing Griffin v.

conspiracy" element easily satisfied by "[d]efendants' history of obstructionist activity, continued 'rescue' training sessions, and recent violations of temporary restraining orders preventing 'rescue' behavior."[68] Likewise, the court found § 1985(3)'s "injury" requirement satisfied by the substantial risk posed to the health of women who had undergone an abortion-related procedure or who otherwise required timely medical attention.[69] Accordingly, the court held that the organizational plaintiffs were entitled to relief under § 1985(3) based on the deprivation of their members' constitutional right to travel.[70]

The court then turned to the plaintiffs' right of privacy claim. The court reiterated the view that when a plaintiff invokes a constitutional right to be free from governmental interference, such as a penumbral privacy right, the plaintiff must establish that the alleged deprivation resulted from, or implicated, state action. Noting that the plaintiffs had already established an independent basis upon which relief would be granted under § 1985(3), the court decided to avoid the "thicket" of having to determine whether the claimed deprivation implicated state action.[71]

Having determined that the plaintiffs were entitled to relief under § 1985(3), the court addressed the propriety of granting the requested permanent injunction. Citing numerous authorities, the court wrote that "[p]ermanent injunctive relief is appropriate where (i) there is no adequate remedy at law, (ii) the balance of the equities favors the moving party, and (iii) the public interest is served."[72] Finding all three of these elements to be satisfied, the court granted the plaintiffs' request for a permanent injunction with respect to the blockading activities, but denied as overbroad the plaintiffs' request for an injunction enjoining those First Amendment activities of defendants "that tend to intimidate, harass, or

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Breckenridge, 403 U.S. 88 (1971) and New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989)). Further, the court held the defendants' claim that the blockades affected only intrastate travel to be without merit, especially in light of evidence that women traveled interstate to obtain abortion-related services from the plaintiff clinics. *Id.*

68. *Id.* at 1493.

69. *Id.*

70. *Id.*

71. *Id.* at 1493-94. With regard to the plaintiffs' state claims, the court upheld the claims based on trespass and public nuisance, and declined to rule on the claim based on tortious interference with business relationships. *Id.* at 1494-96.

72. *Id.* at 1496 (citing New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989); Southern Packaging & Storage Co., Inc. v. United States, 588 F. Supp. 532, 544 (D.S.C. 1984); Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104, 1122 (D. Md. 1982), *aff'd*, 742 F.2d 1449 (4th Cir. 1984); LaDuke v. Nelson, 560 F. Supp. 158, 162 (E.D. Wash. 1982), *aff'd*, 726 F.2d 1318 (4th Cir. 1985)).

disturb patients or potential patients of the clinics."[73] The Court of Appeals for the Fourth Circuit affirmed the district court's decision, held that "the district court operated in conformity with other circuits on the relevant questions of law,"[74] and rejected the defendant-appellants' claim that the district court abused its discretion.

B. Cases Denying Relief Under § 1985(3)

Courts have denied plaintiffs' claims under § 1985(3) in only three of the thirteen anti-abortion protest cases surveyed for this Note. The first such case was *Roe v. Abortion Abolition Society*,[75] decided by the Court of Appeals for the Fifth Circuit in 1987.

The plaintiffs in *Abortion Abolition Society* (individuals, a clinic, and a clinic-transportation service) sought relief under § 1985(3), alleging that the protester-defendants formed a religiously motivated conspiracy "to deny the plaintiffs their rights of education, freedom of choice, privacy, and travel."[76] The district court held that a class defined as persons not sharing the defendants' religious beliefs about abortions was not a class which would satisfy § 1985(3)'s class-based animus requirement, and dismissed the plaintiffs' claims under the statute.[77] On appeal, for the purpose of analyzing the plaintiffs' claims, the court of appeals assumed, without deciding, that the "right to equal exercise of the right to choose an abortion is protected by § 1985(3),"[78] and then turned to the question of whether the plaintiffs constituted a valid class under the statute. The court held that even if religious discrimination is prohibited by § 1985(3), the plaintiffs had not adequately pleaded a claim of discrimination against a class based on religion. The court quoted the dissent in *Scott* for the oft-repeated rule that "the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action."[79] Accordingly, the court found that a class defined as "persons who do not share defendants' religious beliefs about abortion" was not a "class" for § 1985(3) purposes.[80] Finding no class, the court did not rule on the

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73. *Id.* at 1497.

74. *Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990), *cert. granted sub. nom.* Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

75. 811 F.2d 931 (5th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

76. *Id.* at 932.

77. *Id.* at 932-33.

78. *Id.* at 934.

79. *Id.* at 935 (quoting United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 850 (1983)).

80. *Id.* at 935.

merit of plaintiffs' underlying claims of deprivation.[81] The decision in *Abortion Abolition Society* is not necessarily at odds with those cases in which relief was granted to the plaintiffs under § 1985(3). The primary factor in the outcome of the case appears to have been the plaintiffs' ineffective pleading of a novel legal theory.[82]

The second anti-abortion protest case in which relief was denied was the 1989 case of *Mississippi Women's Medical Clinic v. McMillan*.[83] Also decided in the Fifth Circuit, *McMillan* involved anti-abortion protests, but not blockades, at the plaintiff-clinic. The purpose of the protests was to persuade patients of the clinic not to obtain abortions. The plaintiff sought an injunction under § 1985(3) to ban the anti-abortion protests on public sidewalks within 500 feet of the clinic. The district court denied the requested relief.[84] The court of appeals affirmed the lower court's decision on several grounds.[85]

First, the court held that the plaintiff failed to show the requisite animus for a § 1985(3) claim.[86] The plaintiff had characterized the class as "women of childbearing age who seek medical attention" from the plaintiff.[87] The court reasoned that, assuming the class was a protected class under § 1985(3), the plaintiff failed to show the requisite animus against the class in light of the record. The record indicated that the "protesters (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc."[88] Noting prior authority for the proposition that the class-based invidious discrimination element should be evaluated based on animus or motivation, rather than impact, the court deemed the class, as stated by the plaintiff, underinclusive.[89]

The court then examined the rights underlying plaintiff's alleged deprivation. Noting that the plaintiff had requested that the protesting activities be enjoined within a 500-foot radius of the clinic and that no physical blockades or restraints had been erected, the court characterized the plaintiff's complaint as a claim that potential clients were "being denied a supposed right not to hear speech that they do not wish to

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81. *Id.* at 937.

82. The cases in which the plaintiff classes have been granted relief under § 1985(3) are discussed *supra* notes 50-74 and accompanying text.

83. 866 F.2d 788 (5th Cir. 1989).

84. *Id.* at 790.

85. *Id.* at 791.

86. *Id.* at 794.

87. *Id.*

88. *Id.*

89. *Id.* (citing United Bhd. of Carpenters & Joinders of America v. Scott, 463 U.S. 825, 834 (1983)).

hear."[90] Consequently, the court rejected the plaintiff's claim, because a contrary decision would infringe upon the protesters' First Amendment rights.[91]

The court also ruled that failure to issue the injunction posed no threat of irreparable harm to the plaintiff's clients because abortions were still being performed at the clinic, and that the defendants' First Amendment rights outweighed the privacy rights of the plaintiff's clients.[92] Finally, the court found no compelling public interest basis on which to reverse the lower court's denial of the requested injunctive relief.[93]

A concurring opinion emphasized that the only issue before the court was whether the district court abused its discretion. Finding that the plaintiff had failed to establish any likelihood of success on the § 1985(3) claim, the concurrence found no abuse of discretion. In a separate opinion, concurring in part and dissenting in part, Judge Wisdom wrote that he would grant protected-class status to "women seeking medical aid from the clinic,"[94] and that he would issue an injunction "because of the coercive atmosphere generated by the protestors."[95]

The third anti-abortion protest case in which relief was denied under § 1985(3) was *National Abortion Federation v. Operation Rescue*,[96] decided in 1989. The plaintiffs brought a § 1985(3) action seeking relief from abortion clinic blockades. The court held that women seeking abortions were a class, given that the class existed independent of the actions of the defendants,[97] but denied relief under § 1985(3) on the grounds that "courts have never designated 'abortion seekers' as a class requiring special protection . . . [a]nd Congress has never so indicated in legislation."[98] Citing several cases contrary to its view, the court wrote: "With all due respect to these cases . . . [this court] concludes that women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act."[99] The court expressed the view that if the facts at issue constituted sex-based discrimination, they would recognize a class entitled to protection under § 1985(3). The court reasoned, however, that the case presented a sub-class of women comprised of those women seeking abortions and that the animus was not directed at women in

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90. *Id.*
91. *Id.*
92. *Id.* at 795-96.
93. *Id.* at 796-97.
94. *Id.* at 797.
95. *Id.*
96. 721 F. Supp. 1168 (C.D. Cal. 1989).
97. *Id.* at 1170.
98. *Id.* at 1171.
99. *Id.* at 1170.

general as a class.[100] Therefore, the court ruled, no protection was available under § 1985(3). Accordingly, the court granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted.[101]

C. The Present Debate

There are two levels to the present debate regarding whether § 1985(3) is a proper avenue of relief for women prevented from exercising their fundamental and constitutionally protected rights to travel, privacy, and contract, as implicated in a woman's choice to terminate a pregnancy.

The first and most fundamental level of the debate turns on a frequently raised but never fully answered question: To whom are the protections of 42 U.S.C. § 1985(3) to be extended—emancipated slaves and their supporters alone, all persons deprived of fundamental rights as the result of an "invidiously discriminatory animus," or only certain persons deprived of fundamental rights as the result of an "invidiously discriminatory animus?"

The second, narrower level of the debate focuses on whether women, or women seeking abortions, constitute a protected class for § 1985(3) purposes. This level of the debate is demonstrated by the Fifth Circuit's *National Abortion Federation* decision.

III. The Scope of § 1985(3) Generally

The actual language of § 1985(3) supports a broad application of the statute. The words speak in terms of protecting "any person or class of persons" from both direct and indirect conspiratorial deprivations "of the equal protection of the laws, or of equal privileges and immunities under the laws."[102] In addition to the facial breadth of the statute, the historical context in which the statute was created also supports a broad interpretation. Although the activities of the Ku Klux Klan during the Reconstruction Era inspired the creation of the legislation, Congress did not limit the scope of the statute to the protection of emancipated slaves or their supporters. To hold today that only black Americans or racial minorities (and their "supporters") are protected by § 1985(3) would be to disregard the language and plain meaning of the statute. In *Griffin*, the Supreme Court adopted an approach which accorded the language of the statute the power of its plain meaning.[103] This approach was

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100. *Id.* at 1171-72.

101. *Id.*

102. 42 U.S.C. § 1985(3). The complete text of the Section is set forth *supra* note 13.

103. *See supra* notes 31-38 and accompanying text.

reaffirmed by the four dissenting justices in *Scott*.[104] Additionally, in interpreting the criminal analogue of § 1985(3), currently codified at 18 U.S.C. § 241, the Supreme Court has stated that it "must accord it a sweep as broad as its language."[105]

Congressional reports of the 42nd Congress also support a broad application of § 1985(3). As noted in *Scott*, Senator Edmunds, the member of the 42nd Congress who managed the bill on the Senate floor, spoke in terms of protecting an individual from conspiratorial deprivations formed against a man in a variety of types of classes, including "Democrat," "Catholic," "Methodist," or "Vermonter."[106] Representative Shellabarger, the sponsor of the bill, described the purpose of an amendment to the statute in the following fashion:

> The object of the amendment is . . . to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.[107]

An examination of another provision of the Ku Klux Klan Act also supports extending § 1985(3)'s protections to groups other than blacks or racial minorities and their supporters. Currently codified at 42 U.S.C. § 1983,[108] § 1985(3)'s companion statute provides an avenue of relief for "every person" who has suffered a deprivation under color of law of "any rights, privileges, or immunities secured by the Constitution."[109] Section 1983 has been applied to protect a wide range of persons[110] and,

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104. The dissent in *Scott* is discussed *supra* notes 45-48 and accompanying text.

105. Respondents' Brief at 16, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

106. United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 838 (1983) (quoting CONG. GLOBE 42d Cong., 1st Sess., at 567 (1871)).

107. Shatz, *supra* note 11, at 914 (quoting CONG. GLOBE, 42d Cong., 1st Sess. at 478 (1871)).

108. 42 U.S.C. § 1983 was originally enacted as Section 1 of the Ku Klux Klan Act. *See supra* notes 20-25 and accompanying text.

109. 42 U.S.C. § 1983 (1988). The text of § 1983 is set forth *supra* at note 25.

110. Respondents' Brief at 17, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985). *See, e.g.*, Richard v. Penfold, 839 F.2d 392 (7th Cir. 1988) (deciding that a genuine issue of material fact precluded summary judgement in § 1983 action brought by an inmate alleging that a prison official violated his constitutional rights by failing to protect him from sexual assaults by other inmates); Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980) (holding that an equal protection claim is actionable under § 1983 even if the plaintiff is not a member of a suspect class; class status goes to the level of scrutiny only).

as noted in the Respondents' Brief in *Bray*: "Neither statute refers to race; nothing in Section 1983 suggests that its reference to 'persons' is any broader than the 'persons' referred to in Section 1985(3)."[111]

The primary limit on the scope of § 1985(3) appears to be the principle that it should not be applied to create a general federal tort law. As noted in *Griffin*, "[t]hat the statute was meant to reach private action does not . . . mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others."[112] Evidence that Congress did not intend to create a general federal tort law can be found in the congressional reports,[113] and concern regarding such a result has been reiterated in the cases interpreting the Section.[114] There exists a wide expanse, however, within which many persons could be afforded the protection of the statute, between the outer boundary of not creating a general federal tort law, and the unnecessarily narrow view that § 1985(3) may be applied to protect only black Americans subjected to deprivations based on race. Justice Blackmun, writing for the dissent in *Scott*, may have hit upon the key to resolving this conflict: The statute should be applied to protect those classes who are "in danger of not being ensured equal protection of the laws by the local authorities."[115]

IV. § 1985(3) Applied to Enjoin Anti-Abortion Rescue Blockades

A. The Requisite Elements

The question of whether § 1985(3) is properly invoked to enjoin anti-abortion clinic blockades appears to turn upon the "class-based animus requirement" expressed in *Griffin*. Each of the other requisite elements for a successful § 1985(3) claim are satisfied easily in the clinic blockade cases. As noted by the district court in *Bray*, a conspiracy has been defined as "a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some

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111. Respondents' Brief at 17, *Bray* (No. 90-985).

112. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

113. The Court in *Griffin* wrote: "[T]hough the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'" *Id.* at 102-03 (quoting Cong. Globe, 42d Cong., 1st Sess., at 485 (1871)).

114. *See, e.g., id.* at 102-03; United Bhd. of Carpenters & Joinders v. Scott, 463 U.S. 825, 835 (1983).

115. *Scott*, 463 U.S. at 854 (Blackmun, J., dissenting).

lawful purpose by unlawful means."[116] The common usage of the term connotes a "plot."[117] None of the protester-defendants in the anti-abortion blockade cases surveyed asserted the absence of a conspiracy in defense to the claims brought against them.

The requirements of an act in furtherance of the conspiracy and an injury to the target of the conspiratorial deprivation also appear to be satisfied in the anti-abortion blockade cases. The stated purpose of Operation Rescue's "rescue missions" includes, inter alia, preventing women from obtaining legal abortions. Organizing and coordinating a clinic-blockade constitutes an act in furtherance of that conspiratorial purpose. Plaintiff clinics, individuals, and organizations have had no difficulty establishing the resultant injuries when blockades are utilized by protesters.[118]

B. "Women" as a Class for § 1985(3) Purposes

The congressional reports of the debates surrounding the enactment of § 1985(3) supports the statute's application to protect women as a class. In addition to the comments of Senator Edmunds and Representative Shellabarger which support the application of § 1985(3) to a wide variety of classes of persons, another member of the 42nd Congress, Representative Buckley, stated that "'the proposed legislation . . . is not to protect Republicans only in their property, liberties, and lives, but Democrats as well, not the colored only, but the whites also; *yes, even women* . . . ."[119] Additionally, numerous courts of appeals have held that women constitute a protected class for § 1985(3) purposes.[120]

Although the Supreme Court has not explicitly held that women constitute a protected class under § 1985(3), the Court implied that women are among those protected by the statute in the 1979 case of

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116. National Org. for Women v. Operation Rescue, 726 F. Supp. 1483, 1492 (E.D. Va. 1987) (quoting 3 EDWARD J. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 103.23 (1987) (citing also MODEL PENAL CODE § 5.03 (Proposed Official Draft 1962)).

117. THE RANDOM HOUSE COLLEGE DICTIONARY (Revised Edition 1988).

118. The plaintiffs in Mississippi Women's Clinic v. McMillan, 866 F.2d 788 (5th Cir. 1989), had difficulty with the injury element as the court found no irreparable harm in denying the requested injunctive relief. That case is distinguishable from the other cases surveyed, however, as no clinic blockades occurred. *See supra* notes 83-95 and accompanying text.

119. Respondents' Brief at 20, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 478 (1871), at App. 190).

120. *See, e.g.*, Lewis v. Pearson Found., 908 F.2d 318 (1990); New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988); Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984).

Great American Federal Savings & Loan Association v. Novotny.[121] The plaintiff in *Novotny* was a male employee who alleged that he was fired because of his vocal support of female employees. He filed a complaint under Title VII of the Civil Rights Act of 1964 with the Equal Employment Opportunity Commission and, upon receiving a right-to-sue letter, brought an action seeking damages under § 1985(3), claiming a conspiratorial deprivation of equal protection and privileges and immunities under the laws. The district court granted the defendant's motion to dismiss, holding that a single corporation could not engage in a conspiracy.[122] The court of appeals reversed the district court's ruling, holding that "conspiracies motivated by an invidious animus against women fall within § 1985(3), and that Novotny, a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision."[123] The court of appeals also ruled that a Title VII right was an appropriate basis for a § 1985(3) action, and that intra-corporate conspiracies are covered by the Section.

On review of the case, the Supreme Court first noted the remedial nature of § 1985(3), writing that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates."[124] The Court then specifically held that a Title VII right was not a suitable basis for a § 1985(3) claim, as to hold otherwise would permit plaintiffs to avoid entirely the detailed provisions and administrative processes created by Congress under Title VII. The majority opinion appears to have assumed, without specifically ruling on the matter, that sex-based discrimination is an appropriate basis for a § 1985(3) claim, its holding resting solely upon the importance of upholding the congressional scheme found in Title VII.[125]

Justice Powell filed a concurring opinion, writing that he would limit § 1985(3)'s application exclusively to "conspiracies to violate those fundamental rights derived from the Constitution."[126] He expressed that he would not extend the statute's protection to statutory rights created subsequent to § 1985(3)'s enactment. Justice Stevens also filed a concurring opinion, agreeing with Justice Powell that the remedial value of

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121. 442 U.S. 366 (1979).

122. *Id.* at 369.

123. *Id.* at 371.

124. *Id.* at 373.

125. *See, e.g.*, Lewis v. Pearson Found., 908 F.2d at 324 ("[T]he Supreme Court 'has implicitly held that discrimination on the basis of sex is sufficient under the statute.'") (citations omitted). *See also* Respondents' Brief at 20, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) ("The Court assumed, without deciding, in . . . *Novotny* . . . that a conspiracy to discriminate in employment on the basis of sex came within Section 1985(3).").

126. *Novotny*, 442 U.S. at 380 (Powell, J., concurring).

§ 1985(3) should be limited to the redress of deprivations of fundamental rights derived from the Constitution. Justice Stevens specifically added, however, that "[p]rivate discrimination on the basis of sex is not prohibited by the Constitution . . . . I do not believe that [§ 1985(3)] was intended to provide a remedy for the violation of statutory rights—let alone rights created by statutes that had not been enacted . . . ."[127]

Justice White issued a dissenting opinion, joined by Justices Brennan and Marshall. Regarding the majority's specific holding, the dissent expressed the view that concerns about undercutting the Title VII administrative scheme could be alleviated by requiring plaintiffs to exhaust their administrative remedies under Title VII prior to bringing a § 1985(3) action. The more interesting and pertinent portions of Justice White's opinion appear in the footnote to the dissent. He wrote:

> I am not certain in what manner the Court conceives of sex discrimination by private parties to proceed from explicit constitutional guarantees. In any event, I need not pursue the issue because I think it clear that § 1985(3) encompasses all rights guaranteed in federal statutes as well as rights guaranteed directly by the Constitution.[128]

Justice White also wrote that the majority correctly assumed that discrimination on a basis other than race may be vindicated under § 1985(3), based on the Section's broad reference to "all privileges and immunities, without any limitation as to the class of persons to whom these rights may be granted."[129] Significantly, he added: "It is clear that sex discrimination may be sufficiently invidious to come within the prohibition of § 1985(3)."[130]

The *Novotny* decision, the dissenting opinion in *Scott*, and numerous lower federal court cases ruling on the issue all point to the extension of § 1985(3)'s protections to women as a class. Although the matter is far from conclusively settled, the requisite groundwork has been laid for the Supreme Court to explicitly hold that women constitute a class against which a "class-based invidiously discriminatory animus" might be directed, and that such a class of women is protected under § 1985(3).[131]

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127. *Id.* at 385 (Stevens, J., concurring). Justice Stevens added: "I agree with the Court's conclusion that [§ 1985(3)] does not provide respondent with redress for injuries caused by private conspiracies to discriminate on the basis of sex." *Id.* Justice Stevens appears to have been alone in perceiving that the Court reached such a conclusion.

128. *Id.* at 388-39, n.5 (White, J., dissenting). Justice White noted the Court's repeated rulings that the criminal analogue to § 1985(3), 18 U.S.C. § 241, encompasses all federal statutory rights, and that 42 U.S.C. § 1983 encompasses both statutory and constitutional rights. *Id.*

129. *Id.* at 389, n.6 (White, J., dissenting).

130. *Id.*

131. It appears that the class-based invidiously discriminatory animus element re-

V. Conclusion

Neither the language of the statute itself, nor the inferences which might be drawn from the legislative history of § 1985(3), preclude applying the statute to enjoin the rescue blockades. In fact, such a use is in large measure supported by the language of the statute and the available congressional reports pertaining to congressional intent. In addition to the fact that the statutory prerequisites set forth in the Supreme Court opinion in *Griffin v. Breckenridge* have all but uniformly been held to have been satisfied, the Court's decision in *United Brotherhood of Carpenters v. Scott* does not preclude the application of § 1985(3) to the facts at hand. Significantly, the anti-abortion clinic blockade cases present a scenario envisioned by the dissenters in *Scott* as being fitting for the application of § 1985(3): the inability of local authorities to adequately protect the rights of the injured parties.

The Court's opinion in *Bray v. Alexandria Women's Health Clinic* may resolve the conflict in the lower courts regarding the use of § 1985(3) to enjoin anti-abortion rescue blockades.[132] More importantly, the decision may offer new guidelines for the application of the statute that will permit the protection of a broad range of persons without turning the statute into the feared general federal tort law.

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quired for a successful § 1985(3) action will be the most difficult analytical issue for the Supreme Court to resolve in the clinic blockade cases. In *Bray*, discussed *supra* notes 52-74 and accompanying text, reargument before the court presented opposing perspectives on the satisfaction of this element in the clinic blockade cases. Counsel for Operation Rescue argued that women seeking abortions are not a class, and that "a protected class should be defined by who people are, not by what they do." 61 U.S.L.W. 3295, 3296 (Oct. 20, 1992). "Their motive, he emphasized, is opposition to the practice of abortion, not animus toward women." *Id.* Counsel for the plaintiff-respondents in the case, on the other hand, observed that "the defendants . . . do not dispute that women are a class, but argue instead that plaintiffs are only a subset of that class," and noted that discrimination typically works against a subset of a class. *Id.* She also drew analogy to school blockades by anti-integration demonstrators who claimed that they were opposed to integration, but not blacks themselves, and argued that "in most cases, the defendants deny the plaintiffs a right available to all . . . [B]ut here . . . they deny a right available only to women—one that is indispensable to their equality." *Id.*

132. *Bray* is discussed *supra* notes 52-74 and accompanying text. The Supreme Court first heard oral arguments in the case on October 16, 1991. *See* Charles F. Williams & Robert S. Peck, *Supreme Court Preview: Blockade*, A.B.A. J., Oct. 1991, at 48. On June 8, 1992, the case was restored to the Court's calendar for reargument. 112 S. Ct. 2935 (1992). The case was reargued on October 6, 1992, after Justice Thomas joined the Court, causing speculation that Thomas's vote was needed to break a four-to-four tie. 61 U.S.L.W. 3295 (Oct. 20, 1992).

The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures

ANITA M. HODGSON*

INTRODUCTION

An estimated ten percent to twenty percent of all couples of reproductive age are incapable of traditional procreation.[1] For many of these couples, artificial insemination has made the miracle of childbirth and the joy of parenthood a welcome reality. For others, including Fred and Julia Skolnick, the procedure has been less gratifying.[2]

In March of 1985, Fred Skolnick contracted with a Manhattan sperm bank to deposit and store sperm after learning he had a form of cancer which ultimately would affect his ability to father children. The following year, Fred's wife Julia was artificially inseminated after deciding that a child would bond her forever to the memory of her dying husband. Shortly after the child's birth, however, Julia began to doubt that her husband was the child's biological father. Her suspicions were later confirmed by tests revealing that the child was biracial; both Fred and Julia are Caucasian.

Motivated in part by the "unbearable" racial taunting which followed the sperm mix-up, Julia brought a negligence action against her gynecologist and the sperm bank alleging that she had been inseminated with the wrong sperm.[3] Although the Skolnick record was sealed from the public in October of 1989,[4] the case raised several novel issues with regard to

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1. Judith Lynn Bick Rice, Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J., 1055, 1056-57 (1985). *See also* Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984) (approximately 17% of all couples of reproductive age are medically infertile).

2. *See* Edward A. Adams, *Sperm Donor Suit Raises Novel Tort Issues*, N.Y. L.J., March 8, 1991, at 1; Robin Schatz, *New Questions in Sperm Case; Semen Sample Found in Office*, NEWSDAY (N.Y.), April 22, 1990, at 4 [hereinafter *New Questions*]; Robin Schatz, *Woman Settles Sperm Bank Case*, NEWSDAY (N.Y.), July 31, 1991, at 13 [hereinafter *Woman Settles*]; Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, March 9, 1990, at A16 [hereinafter *Mother Accuses*]; Ronald Sullivan, *Sperm Mix-up Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4 [hereinafter *Mix-up Is Settled*].

3. *Mother Accuses*, *supra* note 2, at A16.

4. *Id.*

the liability of physicians and sperm banks which remain unexplored today.

While the notable absence of litigation arising from improper artificial insemination may signify that the procedure has been remarkably trouble-free over the past quarter-century, it is more likely that the lack of precedent is attributable to quiet, out-of-court settlements designed to prevent anxious consumers from discovering the risks involved in the procedure. The *Skolnick* case is a perfect illustration of the latter proposition. A recent edition of New York *Newsday* reported that Julia's attending physician paid a no-fault settlement of approximately $300,000, and the sperm bank purchased its no-fault label from Skolnick for one-third of that amount.[5]

Despite the fact that justice ultimately was served in the *Skolnick* case, the no-fault settlement nevertheless is disturbing in light of the results of an investigation of the sperm bank following the Skolnick complaint. During that investigation, officials shockingly discovered that some of Fred Skolnick's sperm was still preserved in the storage tank, even though Julia was no longer a sperm recipient.[6] Investigating officials also attempted to locate sperm samples of three random donors in the bank's storage tank. In one instance, the officials found it "impossible" to locate the sample.[7] In the other two cases, the officials found it impossible to identify the sperm samples intended for specific recipients because the numerical identification system utilized by the sperm bank did not comply with suggested guidelines and was highly inefficient.[8] According to the investigators, the sperm bank's labeling method also was inadequate in that the paper shipping tags used to identify the storage goblets were likely to disintegrate in the liquid nitrogen utilized in freezing sperm, thus requiring the lab technicians to examine the identification numbers affixed to the sperm viles located inside the goblets. The investigators concluded that once a vile is removed from its goblet for identification purposes, "great concentration" by the technician is required to return the vile to its proper goblet in order to avoid a donor mix-up.[9]

In light of these findings, one might wonder how often donor mix-ups actually occur. One might surmise that even if donor mix-ups were prevalent, they often would go completely undetected in cases in which the mix-ups were not as obvious as the biracial mix-up in the *Skolnick* case.

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5. *Woman Settles*, *supra* note 2, at 13.
6. *New Questions*, *supra* note 2, at 4.
7. *Id.*
8. *Id.*
9. *Id.*

In addition to donor mix-ups, a second major risk assumed by artificial insemination patients involves the health and well-being of the sperm recipients and their potential offspring. Only three states—California, Florida, and Indiana—have enacted legislation going beyond the required testing of sperm donors for the HIV virus.[10] Thus, prospective parents

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10. 1991 Cal. Adv. Legis. Serv. 801 (Deering); FLA. STAT. ch. 381.6105 (1990); IND. CODE § 16-8-7.5-6 (1988).

Although the legislation in California and Indiana provides a specific list of the tests which must be performed before the sperm may be used, no state has statutorily imposed regulations sufficient to meet the recommended guidelines of the American Fertility Society. NEW GUIDELINES FOR THE USE OF SEMEN DONOR INSEMINATION: 1990, Am. Fertility Soc'y Guide, Vol. 53, No. 3 (Supp. 1990). The American Fertility Society suggests a four-step process for the selection and screening of donors with regard to potential diseases.

I. The first step is historical screening for purposes of excluding the following potential donors: 1. Men in AIDS risk groups: (a) any homosexual contact in the last eight years, (b) intravenous drug users, (c) sexual partners of persons in AIDS risk groups, and (d) donors from geographic areas where sex ratio of AIDS patients is close to 1:1; 2. Men having more than one sexual partner within six months; 3. Men with evidence of STD within last six months: (a) dysuria, (b) urethral discharge, (c) genital ulcer, (d) hepatitis, and (e) sexual partner with frequent episodes of trichomonas; and 4. Men with any past history of: (a) genital herpes, (b) genital warts, and (c) chronic hepatitis;

II. If the potential donor is not excluded through historical screening, the second step is blood testing for CMV serology;

III. If the CMV serology is negative, the third step is a physical examination which includes: 1. Genital examination for (a) urethral discharge, (b) genital warts, and (c) genital ulcers; 2. Urethral cultures for: (a) Neisseria gonorrhoeae, (b) chlamydia trachomatis, (c) mycoplasma hominis [optional], (d) trichomonas vaginalis [optional], and (e) white blood cell count [optional]; 3. Blood testing for: (a) hepatitis-B surface antigen and core antibody, (b) HIV [If test is negative, semen samples may be collected and prepared for cryopreservation. The donor should be tested again in 180 days for HIV and the specimen released only if the results are negative.], (c) serologic test for syphilis, and (d) serum antibody test for CMV; and

IV. If the donor is not excluded through the physical examination, rescreening and surveillance should be conducted at least every 6 months. If the donor shows signs of STD, he should be discontinued. Any evident STD transmission should be traced to the donor and his recipients. *Id.* at 6-75.

In addition to disease testing, the American Fertility Society also recommends a four-step genetic screening process.

I. The donor should be generally healthy and, as determined by the use of state-of-the-art tests, should not have or carry: (a) any nontrivial malformation of complex causes, (b) any nontrivial Mendelian disorder, (c) any familial disease with known or reliably indicated major genetic component, (d) an autosomal recessive gene for any disease known to be prevalent in the donor's ethnic background for which heterozygosity can be detected, (e) a chromosomal rearrangement that may result in unbalanced gametes, (f) the donor should be young, and (g) the donor should be Rh-negative if the prospective mother is;

II. The donor's parents and offspring should be free of: (a) nontrivial malformations, (b) nontrivial disorders, showing Mendelian inheritance as to autosomal dominant or x-linked disorders, autosomal dominant inheritance with reduced penetrance, or autosomal recessive inheritance, and (c) a chromosomal rearrangement or imbalance if other than a proven

are understandably concerned about genetic birth defects and the transmission of sexual diseases in cases of anonymous sperm donation. Although the risk of defects and disease could be reduced significantly through more extensive donor screening procedures, such precautionary measures often are omitted by sperm banks and physicians because the additional time and cost involved are economically prohibitive.[11]

In sperm banks which do not automatically perform extensive screening of anonymous donors, in-depth testing could cost the donee an additional $800 to $900.[12] Although this additional cost might appear excessive, it arguably is a small price to pay relative to the enormous cost of caring for a genetically defective or diseased child. Moreover, because the artificial insemination procedure assists in the creation of human life, there clearly is a need for increased moral accountability and legal liability where economizing results in the creation of low-cost, low-quality human offspring.

Uniform legislation specifically governing the artificial insemination process theoretically could supply an adequate remedy to these problems, but practically speaking, the legislative process is too slow and enforcement too rare to provide the needed swift, effective solution.[13] An alternate

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trisomy, unless the donor has a normal karyotype;

III. Major psychoses, epileptic disorders, juvenile mellitus, and early coronary heart disease should be considered as causes for rejection; and

IV. A permanent record designed to maintain confidentiality should be maintained. It should include the genetic workup and other nonidentifying information and should be made available on request, on an anonymous basis, to the recipient and/or any resulting offspring. *Id.* at 8-9S.

11. Lorio, *supra* note 1, at 1652 n.51.

12. Interview with Evan E. Follas, General Manager of Follas Laboratories Inc., Indianapolis (Nov. 12, 1991).

13. As one author stated,

> The implications of the incomplete legal regulation of [artificial insemination by donor] and of the absence of a clear, comprehensive framework for societal policy dealing with new reproductive technologies for the future are important. The issues are too complex, too divisive for us to expect clear-cut resolutions in a short period. The issues must undergo a process of identification, clarification, and consideration that will take time. Prolonging the process will be the impact of the era of technological, cultural, and legal transition and the social debate over the underlying value issues. As a result, it is likely that slow, piecemeal progress through legislation, primarily, and through litigation, on occasion, will continue. *This slowness is not much consolation for those engaged in developing and using these new technologies, but it represents a more accurate view of what the law is and how public policy develops . . . For the foreseeable future, we must live with large areas of legal uncertainty, while working to shape the growth and development of legal policy in these areas.*

Joseph M. Healey, Jr., *Legal Regulation of Artificial Insemination and the New Reproductive Technologies: The Search for Clarification Continues*, in GENETICS AND THE LAW III 139,

system is needed to hold physicians and sperm banks more accountable for their actions and to better compensate disappointed donees. Applying warranty law to the sale of sperm would fulfill this need by economically compelling sperm banks and physicians to be more scrupulous in their endeavors to create human life.

This Note specifically addresses whether Article 2 of the Uniform Commercial Code (U.C.C.), which regulates the sale of goods, can and should be applied to sperm transactions. To demonstrate the need for warranty law in this area, Section I of this Note addresses the shortcomings of negligence as an alternative theory of recovery. Section II advocates the replacement of the outdated "service" characterization of human tissue transactions with a more accurate "vendor-buyer" sales analysis. To lend precedential support to the sperm warranty argument, Section III discusses the liability of commercial blood banks for breach of implied warranty and illustrates how the warranty of sperm likewise has been statutorily implemented in some states. Finally, Section IV briefly concludes this Note by emphasizing the benefits which inevitably would accrue if commercial sperm banks and physicians were bound by the express and implied warranty provisions of the Uniform Commercial Code.

I. Breach of Warranty as a Necessary Theory of Recovery for Injured Donees

A common reaction to sperm warranty as a cause of action is that it is entirely unnecessary. After all, negligence is seemingly the most logical theory of recovery in actions for improper artificial insemination. Although there is little, if any, precedent directly on point, speculation surrounding the *Skolnick* case indicates that there are significant limitations on negligence which may preclude injured donees from recovering at trial.[14] For instance, in those states such as New York which do not recognize theories of joint liability in negligence actions, the donee must prove that either the physician or the sperm bank was responsible for the injury.[15] This evidentiary burden makes recovery virtually impossible in the many instances in which record-keeping and semen processing procedures are

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143-44 (1985) (emphasis added).

See also Rice, *supra* note 1, at 1073 n.197. Rice suggests that legislation in the area of artificial insemination may be difficult to enact because of the negative stigma which the public often attaches to the subject. *Id.* More specifically, legislators are forced to choose between the introduction of bills proposing extensive regulation of the process which will inevitably be poorly received and bills which are very general in nature which are more likely to meet with approval. *Id.*

14. *See* Adams, *supra* note 2, at 1.

15. *Id.*

grossly inadequate both in the doctor's laboratory and in the sperm bank.[16]

Additionally, there is some question as to what specific duty, if any, is owed by the physician and sperm bank to the potential child and prospective parents. In many instances, it is likely that the recipient is led to believe that no duty of care is owed or that, even if a duty of care is owed and subsequently breached, no recovery is possible.[17] Fur-

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16. *See New Questions*, *supra* note 2, at 4. *See generally* Lorio, *supra* note 1 (discussing the need for better regulation and structure of the artificial insemination process).

17. This conclusion is supported by the required signing of standard consent and disclaimer forms releasing both the physician and the sperm bank of any legal liability resulting from improper artificial insemination.

The following is an excerpt from an actual physician release form:

> We release Dr. ____ from any and all liability and responsibility of any nature whatsoever which may result from the complications of childbirth or delivery or from the birth of an infant or infants abnormal in any respect, or from the heredity or hereditary tendencies of such issue, or from any other adverse consequences which may arise in connection with or as a result of the artificial insemination herein contemplated. We shall refrain from bringing legal action of any kind, and refrain from aiding or abetting anyone else in bringing legal action for or on account of any matter or thing which might arise out of the artificial insemination herein contemplated. We shall indemnify Dr. ____ for attorney's fees, court costs, damages, judgments, or any other losses or expenses incurred by him or for which he may be responsible with respect to any claim, legal action, or defense thereto, arising out of the artificial insemination herein contemplated including any claim of or legal action brought by the child or children resulting from the artificial insemination.

Unpublished consent form provided by a local sperm bank.

In addition to signing the physician release form, the recipient must also sign a form releasing the sperm bank from all legal liability. The following is an excerpt from a sperm bank release form:

> We understand that [said sperm bank] does not warrant or guarantee the qualifications of said donor, and that in determining whether the donor meets the aforesaid qualifications of [said sperm bank] or any of its employees shall be required to make only such investigations of and concerning such donor as shall in the sole discretion of [said sperm bank] or any of its employees seem reasonably necessary. We further covenant and agree to forever refrain from instituting, pressing or in any way aiding any claim, demand, cause of action for damages, cost, loss of services, expense of compensation for or on account of or hereafter arising out of the premises hereinabove set forth. We further promise and agree to indemnify and save harmless [said sperm bank] and any of its employees from loss and/or expenses incurred by them in connection with the defense of payment of any claim or action arising out of the aforesaid premises or agreements herein contained. [Said sperm bank], whenever used herein, shall include all physicians and other personnel who perform services for us on behalf of [said sperm bank]. This agreement shall be binding upon ourselves, and each of use, our assigns, heirs, executors, and administrators.

Unpublished consent form provided by a local sperm bank.

In light of the legally binding appearance of these agreements and the patent disincentive

thermore, while several states have recently enacted or proposed legislation mandating the testing of sperm donors for the HIV virus,[18] only three states require that donors meet additional medical standards in order to donate sperm.[19] Absent significant legislation in the remaining forty-seven states, the additional screening of sperm donors for genetic disorders and diseases in these states arguably is optional, thereby releasing the sperm bank and attending physician from liability if the donation of contaminated or defective sperm results in the birth or abortion of genetically defective or diseased offspring.

On the other hand, it is possible that the lack of statutory provisions has left the door wide open to the imposition of liability, thereby discouraging cautious physicians from actively participating in the procedure.[20] Despite the real possibility of a negligence suit, the artificial insemination procedure is still quite popular.[21] At least one physician speculates that the willingness of physicians to perform the procedure without first having tested the donor for genetic defects or diseases is attributable to the routine use of medical students as sperm donors.[22] Because medical students are generally "men who realize the importance of certain family genetic details and know what information is crucial to the safety of their sperm, . . . [the] process spares the expense of performing a series of expensive tests on every donor."[23]

Notwithstanding the reliability and integrity of medical students in general, donor screening is absolutely imperative whether the donor is a

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to bring suit embodied in the indemnification clauses, it is possible that injured donees will forego any legal claims because, on the basis of the disclaimer provisions, litigation would prove to be both costly and futile. However, this reaction would appear to be a misconception because several courts have held that exculpatory clauses of this nature are unenforceable. *See* Bernard D. Hirsch, J.D., *Parenthood by Proxy*, 249 JAMA 2251, 2252 (1983).

18. 1991 Cal. Adv. Legis. Serv. 801 (Deering); DEL. CODE ANN. tit. 16, § 2801 (1990); FLA. STAT. ch. 381.6105 (1990); ILL. REV. STAT. ch. 127, para. 55.45 (1989); IND. CODE § 16-8-7.5-14 (1988); LA. REV. STAT. ANN. 40:1062.1 (West 1990); MD. HEALTH-GEN. CODE ANN. § 18-334 (1990); MONT. CODE ANN. § 50-16-1008 (1991); N.C. GEN. STAT. § 130A-148 (1990); OHIO REV. CODE ANN. 3701.246 (Baldwin 1991); OKLA. STAT. tit. 63, § 2151.1 (1990); R.I. GEN. LAWS § 23-1-38 (1987); W. VA. CODE § 16-3C-2 (1991); WIS. STAT. § 146.025 (1987).

19. *See supra* note 10 and accompanying text.

20. *But see* Rice, *supra* note 1, at 1070 (The Article notes a decrease in the performance of the artificial insemination procedure as a result of the enactment of the Ohio Paternity Act which *statutorily* opened the door to legal liability. This decrease, which became apparent only *after* the enactment of the statute, strengthens the argument that, absent legislation, sperm banks and physicians are not subject to legal liability for improper artificial insemination.).

21. *See* Rice, *supra* note 1, at 1070 n.168.

22. *Id.* at 1075 n.211. *See also* Lorio, *supra* note 1, at 1651 n.48 (confirming the frequent use of medical students, graduate students and professionals as sperm donors).

23. Lorio, *supra* note 1, at 1651 n.48.

genetic physicist or a panhandler. In either instance, the man may unknowingly be the carrier of a genetic disorder or sexual disease. If testing for such a condition is not performed, it is the recipient and potential human offspring who ultimately will suffer. Once the defect or disease is passed on by a donor to a donee or an innocent child, it is difficult to compensate for the pain, suffering, and embarrassment resulting from the injury.

Because negligence is not a sure-fire theory of recovery,[24] it is probable that in the past, physicians and sperm banks have pressured victims into accepting out-of-court settlements in order to protect their professional reputations and avoid the large judgments of sympathetic juries.[25] Although settlement does ensure at least minimal compensation for injured donees, it has done little to compel affirmative action by physicians and sperm banks to avoid similar claims in the future.[26]

The expeditious enactment of statutes regulating the artificial insemination process is highly unlikely.[27] Therefore, economic incentives must be used to exact the measures necessary to decrease the incidence of improper artificial insemination. By applying Article 2 of the U.C.C. to sperm transactions, the economic stakes for failure to pre-screen donors will invariably increase because the "strict liability" aspect of the claim will virtually guarantee recovery for injured donees. (However, an exception to the U.C.C. will be necessary where the medical disorder could not have been detected with available technology.[28]) Thus, the warranty of sperm would not only serve to compensate disappointed donees when problems arise, but it would also compel preventive measures to ensure that fewer donees are injured in the future.

II. Sperm Transactions as "Sales" Rather than "Services"

Any valid claim for breach of warranty under the U.C.C. requires

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24. *See supra* notes 14-17 and accompanying text.

25. *See, e.g.*, *Woman Settles*, *supra* note 2, at 13; *Mix-up is Settled*, *supra* note 2, at B4.

26. The following warning was published in the Journal of the American Medical Association in 1983:

> Physicians have an ethical and legal responsibility to use caution and scientific screening techniques in the selection of donors of semen for artificial insemination. Relying on the verbal representations of donors as to their health, without any medical screening, is precarious. The donor should be checked for genetic defects and inheritable diseases.

Hirsch, *supra* note 17. Despite this warning, some sperm banks still do not engage in extensive donor screening, Interview with Evan Follas, *supra* note 12, and absent legislation or economic compulsion, it is likely that the safeguards afforded by donor screening will continue to be overlooked by these sperm banks in the future.

27. *See supra* note 13 and accompanying text.

28. *See infra* pp. 46-49.

an initial showing that the disputed transaction constitutes a "sale" pursuant to section 2-106(1) of the U.C.C. According to this section, "a 'sale' consists in the passing of title from the seller to the buyer for a price."[29] Even if these elements exist, a problem arises where the elements of a service also are present, because services are not governed by the U.C.C.[30] The determinative test in these situations is one of predominance.[31] If the transaction is predominately a service and the sale of goods is incidental, the U.C.C. will not apply; if a service is incidental to the sale of goods, the U.C.C. will apply.[32]

There are three possible types of sperm transactions involved in the artificial insemination process. First, there is the donor/sperm bank transaction in which the donor provides the sperm bank with a vile of semen and receives monetary consideration in return.[33] Although the donor performs a service in extracting the semen, it arguably is not the service of extraction for which the donor receives compensation.[34] Therefore, the service is incidental to the sale of the sperm, so the U.C.C. should apply.

The second type of sperm transaction involves the sperm bank and the attending physician. In this transaction, the sperm bank procures and stores the sperm, eventually passing it on to the donee's physician in exchange for monetary consideration.[35] No service elements are present here, so the U.C.C. clearly should apply.

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29. U.C.C. § 2-106(1) (1990).

30. 1 SAMUEL WILLISTON, WILLISTON ON SALES 94 (4th ed. 1973), *noted in* David E. Chapman, Note *Retailing Human Organs Under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 408 (1983).

31. WILLISTON, *supra* note 30, at 103-04.

32. *Id.*

33. The normal rate of compensation for sperm donors is $50 per donation, but payment does not begin until the donor has successfully completed the screening process. Donors generally are asked to donate for one to two years, at least once, but not more than twice a week. Interview with Evan Follas, *supra* note 12.

34. Theoretically, the money which the donor receives is compensation for the time, energy, and discomfort involved in the act of donating. OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUE AND CELLS 56 (1987) [hereinafter NEW DEVELOPMENTS]. Under this rationale, it follows that a donor should be paid for every donation, regardless of whether the sperm subsequently is determined to be salable, since the time, effort, and discomfort involved in the process arguably is present regardless of the purposes and results of the donation. However, in those instances where the sperm bank engages in extensive donor screening, the donor often is required to provide several semen samples for testing purposes without compensation. Interview with Evan Follas, *supra* note 12. It is only after the donor has successfully completed the donor screening process that he is compensated for his efforts. *Id.* As one man put it, the sperm which is stored during the quarantine period (for AIDS testing) is "an investment." *Id.* When the sperm finally is released for sale, "return on the investment" is forthcoming. *Id.* Because, in practice, donors are not compensated unless their sperm is sold, it is clear that the service of extraction is incidental to the sale of the sperm, so the U.C.C. should apply.

35. Although some sperm banks will sell directly to recipients, it is more common

The third and final type of sperm transaction occurs when the physician inseminates the donee with the sperm in exchange for monetary payment. In this case, the payment covers both the sale of the sperm and the insemination procedure. This transaction includes service elements sufficient to warrant application of the predominance test.[36] Considering that the motivation of the donee is to receive the sperm rather than medical care or treatment, a strong argument can be made that the medical service provided by the physician is merely incidental to the sale of the sperm. This argument is bolstered by an increased incidence of self-insemination,[37] which illustrates that while a physician's services are not required for successful artificial insemination, the acquisition of sperm is absolutely imperative. Because the medical service is incidental to the sale in this transaction, the U.C.C. should apply to this transaction as well.

Unfortunately, the reasons for applying the U.C.C. to sperm transactions may be undermined by a line of cases and state statutes universally characterizing human tissue transactions as "services" rather than "sales."[38] This characterization is perhaps best explained as a well-intended legal fiction concocted by concerned judges and legislators as a pretextual vehicle for furthering various social policies. These policies include limiting legal liability in the medical community in cases of defective blood transfusions and organ transplants, preventing the sale of human organs for monetary gain, and protecting potential human life by eliminating the sale of human fetal tissue. Because the policy considerations underlying the "service" characterization arguably do not apply to sperm transactions, an injured donee might circumvent the fatal "service" characterization by distinguishing sperm transactions from other human tissue transactions so that U.C.C. may be applied. The grounds for distinguishing sperm from other human organs and tissues are discussed at length in the remainder of this section.

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for the sperm bank to sell to physicians and fertility clinics. Interview with Evan Follas, *supra* note 12. The physician or clinic will then resell the sperm to the recipient in conjunction with the insemination procedure. *Id.* The average cost for a vile of "good" sperm is between $110 and $120. *Id.*

36. *See supra* notes 29-32 and accompanying text.

37. Norman Frost, M.D., M.P.H., *Regulating Genetic Technology: Values in Conflict*, in GENETICS AND THE LAW III 15-17 (1985).

38. ALASKA STAT. § 45.02.316 (1991); ARK. CODE ANN. § 4-2-316 (Michie 1991); CONN. GEN. STAT. § 19a-280 (1990); DEL CODE ANN. tit. 6, § 2-316 (1990); FLA. STAT. ch. 672.316 (1990); GA. CODE ANN. § 11-12-316 (Michie 1991); IND. CODE § 16-8-7-2 (1990); MASS. ANN. LAWS ch. 106, § 2-316 (Law. Co-op. 1991); MICH. COMP. LAWS § 333.9121 (1991); MO. REV. STAT. § 431.069 (1990); NEV. REV. STAT. ANN. § 460.010 (Michie 1989); N.C. GEN. STAT. § 130A-410 (1990); N.D. CENT. CODE § 41-02-33 (1991); OR. REV. STAT. § 97.300 (1989); S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1990); TENN. CODE ANN. § 47-2-316 (1991); TEX. BUS. & COM. CODE ANN. § 2.316 (West 1991); WYO. STAT. § 34.1-2-316 (1991). *See also* NEW DEVELOPMENTS, *supra* note 34, at 76.

A. Distinguishing Blood Transactions

The landmark case establishing the sale/service distinction for human blood transactions is *Perlmutter v. Beth David Hospital*.[39] In *Perlmutter*, the plaintiff sought to recover for injuries resulting from a transfusion of "bad" blood, claiming that the hospital's furnishing of the bad blood was a breach of the implied warranties of merchantability and fitness under the New York Sales Act.[40] The New York Court of Appeals rejected this claim, holding that the plaintiff failed to state a cause of action for breach of implied warranty.[41] The court reasoned that the transaction between the hospital and the patient was predominately an agreement for the services of care and treatment.[42] Because the sale of blood was incidental to the services rendered, the Sales Act's warranties did not apply.

This rationale was criticized vehemently in Judge Froessel's dissenting opinion.[43] Judge Froessel argued that the plaintiff was not suing the hospital "for the service of injecting the blood into her bloodstream, but simply for the *sale* of 'bad' blood for a separate valuable consideration, over and above the consideration she was paying for room and board and the usual hospital facilities . . . and services."[44]

Although the *Perlmutter* decision technically rested on a valid application of warranty law, it is evident that the court's stringent sale/service distinction was predicated primarily on the fear of imposing strict legal liability on the medical community. This conclusion is supported by the majority opinion, which states in relevant part:

> If, however, the court were to stamp as a sale the supplying of blood — or the furnishing of other medical aid — it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of "bad" blood.[45]

Although strict liability for contaminated blood was a threat when *Perlmutter* was decided in 1954, technological advances have since made it possible to detect various disease-causing agents in human blood and tissue samples.[46] With modern safeguards in place, the strict liability concern

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39. 123 N.E.2d 792, *reh'g denied*, 125 N.E.2d 869 (1954).
40. *Id.* at 793.
41. *Id.* at 794.
42. *Id.*
43. *Id.* at 795-96.
44. *Id.* at 796.
45. *Id.* at 795.
46. *See, e.g.*, Chapman, *supra* note 30, at 406 n.83 (discussing the discovery of a hepatitis vaccine which had the potential to drastically reduce the incidence of defective blood transfusions); *see also* AMERICAN ASSOCIATION OF BLOOD BANKS, TECHNICAL MANUAL (1990); JOHN A. KOEPKE, LABORATORY HEMATOLOGY (Churchill Livingstone 1984).

should have diminished greatly. However, even if strict liability is still a concern due to certain defects which are impossible to detect, one effective solution is an "undetectable defect" affirmative defense to strict products liability.[47] The "undetectable defect" exception would operate in a manner similar to section 402A of the Restatement (Second) of Torts:

> [S]hould the product be one which cannot be made absolutely safe, but is nevertheless essential to human health, and if its use is prescribed by a physician who is made fully aware of the risk of harm, but who, in his sound judgment, believes that taking the risk is justified, then the fact that there is an undetectable defect in a certain percentage of the product will not result in a breach of warranty.[48]

This "undetectable defect" concept was recently expanded and codified in a 1987 Idaho statute which provides that "a paid blood, organ or tissue donor, or a blood, organ or tissue bank operated for profit" may be held liable under the implied warranties of merchantability, except that "the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of standard established scientific procedures or techniques."[49]

Having provided a safeguard for undetectable defects, it seems that there is no valid reason for insisting on a sale/service distinction to shield the medical community from legal liability.[50] Even so, it is still possible to create a public policy exception for physicians and hospitals acting to promote the public welfare by concluding that it is the blood bank (not the hospital or attending physician) which holds itself out as a merchant

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47. *See* Joseph E. Dugas, Jr., M.D., Note, *Implied Warranty in Sale of Blood*, 17 LOY. L. REV. 229, 231 (1970-71).

48. RESTATEMENT (SECOND) OF TORTS 402A cmt. (K), *cited in* Dugas, *supra* note 47, at 231-32.

49. IDAHO CODE § 39-3702 (emphasis added). *See also* IOWA CODE ANN. § 142A.8 (West 1989) ("[A]ny person or entity that renders such service warrants only under this section that due care has been exercised and that acceptable professional standards of care in providing such service according to the current state of the medical arts have been followed"); S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1991), which provides:

> The implied warranties of merchantability and fitness shall not be applicable, so far as the transmission of certain infectious diseases . . . which diseases and reactions cannot be detected by standard testing are concerned, to a contract for the sale of human blood, blood components, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs.

50. *See, e.g.*, Cunningham v. MacNeal Memorial Hosp., 266 N.E.2d 897 (Ill. 1970) (holding a hospital strictly liable for providing bad blood as part of the services for which it charged). This decision was later overruled by an Illinois statute which expanded the *Perlmutter* "service" characterization to tissues and organs.

having specialized knowledge and skill with respect to the sale of the blood.

Under the U.C.C., once it is determined that the disputed transaction is a "sale" within the terms of section 2-106(1), the seller of the goods must be deemed a merchant pursuant to section 2-104(1) in order for the implied warranty of merchantability to apply. In addition, the buyer must rely on the seller's knowledge and skill in order for the implied warranty of fitness to apply. U.C.C. section 2-104(1) provides:

> 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.[51]

Under this definition, the commercial blood bank is arguably the merchant which markets its knowledge and skill with respect to the blood, and the hospital and attending physician are merely consumers whose specialized knowledge and skill lie in the area of transfusion rather than blood testing.[52] Thus, the implied warranty of merchantability would not apply against the physician or hospital.

This "knowledge and skill" distinction, which clearly applies to commercial blood transactions, has even greater application to sperm bank/physician transactions in which the attending physician would most likely have specialized training in the performance of the artificial insemination procedure. However, it may not have the training and resources to screen the sperm donor for genetic defects and diseases. In fact, it is generally the sperm bank, not the physician, that selects and screens donors; the physician usually has little or no contact with the donor.[53] Once the

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51. U.C.C. § 2-104 (1990). The 'merchant' definition is supplemented by U.C.C. section 2-104 cmt. 2 which states in relevant part:

> [I]n Section 2-314 on the warranty of merchantability, such warranty is implied only 'if the seller is a merchant with respect to goods of that kind.' Obviously this qualification restricts the implied warranty to a much smaller group than everyone who is engaged in business and requires a professional status as to particular kinds of goods.

52. In this respect, the detection of defects and diseases in the blood purchased from the blood bank can be said to lie outside the "mercantile capacity" of the hospital and physician, just as the U.C.C. suggests that buying fishing tackle for his own use lies outside the "mercantile capacity" of a lawyer or bank president. U.C.C. § 2-104 cmt. 2. This analogy presumably holds true regardless of whether the lawyer and bank president are world-class fisherman or mere dabblers in the sport.

53. Interview with Evan Follas, *supra* note 12.

physician has explained the sperm procurement procedure to the donee, the donee will not be able to "reasonably rely" on the physician's knowledge and skill with respect to the quality of the sperm, so the implied warranty of fitness will not apply against the physician.

Having established that the commercial sperm bank is a merchant with specialized knowledge and skill with respect to the sale of the sperm, the implied warranties of merchantability and fitness attach to the sale against the commercial sperm bank. Thus, an injured donee could invoke the operable form of U.C.C. section 2-318 as a third party beneficiary and recover for injuries by showing that "it [was] reasonable to expect that [she] may use, consume or be affected by the goods and [she was] injured by the breach of warranty."[54] The benefit of this section is that it eliminates the need for direct privity between the seller and the beneficiary of the goods.[55] Therefore, the injured donee would be able to bring a direct action for breach of warranty against the sperm bank whose warranty extends to her through the sale of the unmerchantable sperm to the hospital or attending physician.

Unfortunately, the *Perlmutter* court failed to recognize either the "undetectable defect" affirmative defense or the "acting as a merchant" rationale when it determined that there was no liability in the context of defective blood transactions. In effect, the court allowed the blood bank to shield itself from legal liability by using the hospital as a "middleman," so that the predominating services of the hospital and attending physician would bar any claim for breach of warranty. Thus, the sale/service distinction designed to protect the medical community actually operated to benefit the commercial blood bank, which presumably yielded higher profits from monies which otherwise would have been allocated to donor testing had the Sales Act warranties applied.

Addressing the inequities resulting from the shielding of commercial blood banks under the *Perlmutter* sale/service distinction is a long line of cases holding that a plaintiff *can* state a valid cause of action for

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54. The primary shortcoming of the third party beneficiary argument is that it might fail in those jurisdictions which have adopted U.C.C. section 2-318 Alternative A. This alternative limits recovery to "any natural person who is in the family or household of his buyer or who is a guest in his home," thereby making recovery by the injured donee more difficult. U.C.C. § 2-218 Alternative A (1990). However, U.C.C. section 2-318 Comment 3 provides:

> The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, *the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.*

(emphasis added).

55. U.C.C. § 2-318 cmt. 2 (1990).

breach of implied warranty against a blood bank.[56] These cases are discussed further in Section III, where commercial blood banks are analogized to commercial sperm banks in order to lend precedential support to the sperm warranty argument.

Despite the recognition of implied warranty recovery by those courts rejecting *Perlmutter*, other courts are compelled to follow state statutes which codify the outdated *Perlmutter* sale/service doctrine.[57] In these states, the only way for an injured donee to circumvent the *Perlmutter* doctrine is for the court to reject the statute as impermissibly broad or vague or to explicitly distinguish sperm transactions from other human tissue transactions so that the statutes will not be interpreted to preclude the warranty of sperm.

In *Gottsdanker v. Cutter Laboratories*,[58] a plaintiff successfully circumvented such a statute by arguing that the contaminated poliomyelitis vaccine which caused his injury was intended for human consumption just as food is intended for human consumption. The plaintiff insisted that if a consumer of contaminated food could recover from the manufacturer under warranty law, then the same rule should apply to the manufacturer of the polio vaccine.[59] Notwithstanding the fact that the vaccine was developed from a culture which *included human blood*, the court in *Gottsdanker* accepted the plaintiff's argument, disregarding the literal wording of the applicable California statute, which provided in relevant part:

> [T]he procurement, processing, distribution or use of whole blood, plasma, *blood products*, and *blood derivatives* for the purpose of injecting or transfusing the same or any of them into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of service by each and every person, firm or corporation participating therein and *shall not be construed to be, and is declared not to be, a sale* of such whole blood, plasma, blood products or blood derivatives for any purpose or purposes whatsoever.[60]

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56. White v. Sarasota County Pub. Hosp. Bd., 206 So. 2d 19 (Fla. Dist. Ct. App. 1968), *cert. denied*, 211 So. 2d 215 (Fla. 1968); Russell v. Community Blood Bank, 196 So. 2d 115 (Fla. 1967); Hoder v. Sayet, 196 So. 2d 205 (Fla. Dist. Ct. App. 1967); Hoffman v. Misericordia Hosp., 267 A.2d 867 (Penn. 1970).

57. *See* statutes cited *supra* note 38.

58. 6 Cal. Rptr. 320 (Cal. Ct. App. 1960).

59. This human consumption analogy has also been applied to blood. *See, e.g.*, Russell v. Community Blood Bank, Inc., 196 So. 2d 115, 118 (Fla. 1967) (holding that blood is a commodity "intended for human consumption" and that the supplier of the blood is liable without fault for injuries caused by any defects in the blood).

60. *Gottsdanker*, 6 Cal. Rptr. at 324 (quoting CAL. HEALTH & SAFETY CODE § 1623 (West 1955) (emphasis added).

Although the *Gottsdanker* court was aware that the applicable statute was a codification of the *Perlmutter* doctrine, it nevertheless rejected a literal interpretation of the statute, finding that it "strain[ed] construction unreasonably."[61]

In sperm transactions, an analogy can be drawn between defective sperm and the defective polio vaccine in that both products are intended for "human consumption." Just as the plaintiff in *Gottsdanker* convinced the court that codification of the *Perlmutter* doctrine "strained construction unreasonably" thereby leading the court to reject the statute in favor of the injured consumer, so too could the injured donee in a defective sperm case convince a court to disregard the literal wording of a warranty-limiting statute extending the *Perlmutter* doctrine to organs and other human tissues.

In arguing that the warranty-limiting statute does not apply to sperm, the injured donee can supplement his "human consumption" argument by emphasizing specific flaws or loopholes in the structure and wording of the statute. For example, South Carolina's warranty-limiting statute provides:

> The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale, procurement, processing, distribution, or use of *human tissues such as corneas, bones or organs*, whole blood, plasma, blood products or blood derivatives. *Such human tissues*, whole blood, plasma, blood products or blood derivatives shall not be considered commodities subject to sale or barter and the transplanting, injection, transfusion or other transfer of *such substances* into the human body shall be considered a medical service.[62]

By focusing on the legislature's failure to list sperm as one of the specific tissues within the scope of the statute, the injured donee can argue that the omission was intentional, thereby indicating that the statute does not apply to sperm transactions.

If the "human consumption" analogy fails and the court rejects the "intentional omission" argument, the injured donee has an even stronger argument that the *Perlmutter* doctrine does not apply to sperm transactions because the "life-or-death" need for medical aid which exists with regard to blood transfusions is not present in the context of artificial insemination. Since no life-threatening condition exists, the public interest in the medical service is not so great as to outweigh the need for donor screening. Thus, there is no need for the fictional characterization of the sperm transaction

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61. *Id.* at 325.

62. S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1976) (emphasis added).

as a service rather than a sale, and the implied warranties of merchantability and fitness should apply. If the court accepts this argument, the plaintiff is likely to prevail if he is able to convince the court that sperm transactions also can be distinguished from other organ and tissue transactions governed by the warranty-limiting statute.

B. Distinguishing Organ Transactions

The increased rate of successful organ transplantation over the past two decades has prompted an ever-increasing demand for human organs.[63] One of the more controversial legal issues today is whether human organs can and should be bought and sold on the open market to meet this demand.[64] With the passage of the National Organ Transplant Act (Transplant Act)[65] in 1984, Congress resolved this issue by prohibiting the sale of human organs for subsequent transplantation.[66] The effect of this Act was to deny basic property rights in the human body.[67]

Despite the severe restrictions imposed by the Transplant Act, the Act is not all-inclusive or overly broad. Significantly, the Transplant Act provides that *"[t]he term 'human organ' is not intended to include replenishable tissues such as blood or sperm."*[68] The theory behind this distinction is twofold. First, bodily tissues and fluids, including blood and sperm, have historically been viewed as commodities acceptable for sale.[69] Second, because of the replenishable nature of blood and sperm, there is no serious threat to human life involved in the donation process, thus making it much safer and more acceptable than the donation of vital human organs.[70]

Although sperm can be distinguished adequately from other human organs and tissues on the basis of replenishability alone, there are several policy considerations underlying the Transplant Act which are indispensable in determining the efficacy of human organ sales which do not apply to

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63. Chapman, *supra* note 30, at 395-95.

64. *See generally* Chapman, *supra* note 30 (advocating the sale and warranty of human organs as merchantable products); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182 (1974) (emphasizing the shortcomings of the Uniform Anatomical Gift Act and the failure of altruistic donations to meet the high demand for human organs).

65. National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2342 (1984) (codified as amended at 42 U.S.C. §§ 273-74 (1988 & Supp. II 1990)).

66. Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After Moore v. Regents of the Univ. of Cal.*, 75 VA. L. REV. 1363, 1372 (1989).

67. *Id.*

68. *Id.*

69. Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 221 n.68 (1986).

70. Lavoie, *supra* note 66, at 1372 n.72.

the sale of sperm. These distinctions support the argument that state statutes precluding the warranty of human organs should not be construed to prohibit the warranty of sperm.[71] Among the factors which distinguish sperm donation from organ donation are: (1) the adverse effects which a market system would have on organ donation, (2) the "moral aversion" associated with the sale of human body parts, and (3) the possibility of improper pressures and motivations in the purchase and sale of human organs.[72]

With regard to the potential adverse market effects involved in commercialized human organ donation, at least three major concerns are present: (1) a decrease in charitable donations, (2) an increase in the donation of defective organs, and (3) competitive bidding between potential donees.[73] Since sperm donation, for the most part, has been successfully commercialized, these concerns largely have been eliminated.

First, unlike blood and organ donation, sperm donation traditionally has been a compensated activity.[74] Therefore, charitable sperm donations presumably were not sacrificed when commercial sperm banks went into business. Second, with regard to the donation of defective body parts, sperm is easily distinguished from human organs in that the sperm donation process is much simpler, less intrusive, and less expensive, making the cumulative economic costs of defective sperm donation quite low in comparison to the potential costs of defective organ donation.[75] Moreover, the life-threatening need which often accompanies organ transplantation is not present in the artificial insemination process.[76] There is more time for extensive screening to detect genetic defects and diseases in sperm donors, thus reducing the use of defective donations. In this respect, the potential social costs of defective sperm donation are much lower than the potential social costs of defective organ donation.[77] Finally, the "com-

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71. *See* statutes cited *supra* note 38.

72. Hardiman, *supra* note 69, at 236.

73. *Id.* at 237.

74. According to American Fertility Society Guidelines, "Payment to donors . . . should not be such that the monetary incentive is the primary factor in donating sperm." However, in reality, money—not altruism—is the ultimate motivation for sperm donors. Interview with Evan Follas, *supra* note 12.

75. While extensive genetic screening of sperm donors costs between $800 and $900 and the general rate of compensation for sperm donors is $50 per donation, there are no additional costs involved in the procurement of sperm. Interview with Evan Follas, *supra* note 12. The procurement of organs, however, necessarily involves enormous medical fees because surgical removal of the donated organ is required. Thus, the combined costs of donor screening, organ removal, and donor compensation inherent in the organ donation process would be astronomical in comparison to the relatively low costs of sperm donation.

76. *See supra* text accompanying note 70.

77. Because the possibility of a defective organ donation and its concomitant social

petitive bidding" argument for precluding the sale of human organs in order to prevent unfair market competition has absolutely no application to the sale of sperm. Because "preferred" donors can, and often do, donate their sperm frequently, competitive bidding due to limited resources is not a legitimate concern for sperm recipients.[78]

The second major concern associated with the sale of human organs is moral aversion. One author has speculated that individuals often are reluctant to place a price on human body parts and consequently are offended by the concept of commercialized human organ sales.[79] Notwithstanding the merits of this concern in the context of human organ donation, sperm donations bring an average price of $50 in the sperm banking industry. Moreover, while the sale of sperm arguably is less offensive than the sale of organs because semen is nonvital and naturally excreted, distinguishing sperm from human organs on the basis of the nature and practice of sperm donation is unnecessary since the barter and sale of more vital human body parts is actually commonplace in the medical research community.[80] In fact, a 1986 study reveals the existence of approximately 350 biotechnology companies nationwide working to develop multibillion dollar diagnostic and therapeutic products, *most of which are derived from human tissues.*[81] However, if current practice is followed, everyone involved in the biotechnology industry will profit from the sale of human body parts, except for the donors.[82] With a multibillion

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costs was one of the reasons for prohibiting the sale of human organs, it follows that extensive donor screening should be compelled in the area of artificial insemination in order to prevent the donation of defective sperm, thereby reducing the number of genetically defective or diseased offspring who will be born as a result of the artificial insemination process.

78. *See supra* note 36. In fact, sperm donors who donate regularly can earn between $2600 and $5200 per year, Interview with Evan Follas, *supra* note 12, and there is so much repeat donation that incest and a subsequent weakening of the gene pool are issues addressed by many critics of the artificial insemination process. *See* Lorio, *supra* note 1, at 1652 n.57 (stating that physicians at Tulane limit the use of a single donor to one to three pregnancies); NEW GUIDELINES FOR THE USE OF SEMEN DONOR INSEMINATION: 1990, Am. Fertility Soc'y Guide, Vol. 53, No. 3 (Supp. 1990) (stating that "the danger of an increase in consanguinity over that which occurs in the general population is essentially nil if the limit is set at 10 pregnancies per donor").

79. Hardiman, *supra* note 69, at 240.

80. Interview with Evan Follas, *supra* note 12. *See also* note 74.

81. Lavoie, *supra* note 65, at 1364. *See also* Hardiman, *supra* note 69, at 221 (discussing a woman who earned "$200 a week, together with $25,000 cash, 1000 shares of stock, and the use of a car" in exchange for regular donation of her blood which contained a rare antibody and a graduate student who received $150 in exchange for 10 grams of nonregenerative thigh muscle).

82. Hardiman, *supra* note 69, at 228. *See also* Moore v. Regents of the Univ. of Cal., 793 P.2d 494, 495 (Cal. 1990) (allowing a physician to profit at his patient's expense by holding that extension of conversion law to a patient's removed cells would "hinder research by restricting access to necessary raw materials").

dollar industry already in place, it is obvious that moral aversion has not been sufficient to preclude the exploitation of human body parts for monetary gain. Therefore, it is anomalous to argue that moral aversion is a valid reason for proscribing just compensation to the donors.

The third major reason for prohibiting the sale of human organs for subsequent transplantation is the possibility of improper pressures and motivations in the sale of human body parts. This objection is premised on the belief "that the poor will be encouraged to donate organs for the rich and that risks of death for pecuniary profit are unacceptable."[83] Though the merits of this argument could be debated extensively,[84] it is sufficient for the purposes of distinguishing sperm sales from organ sales to simply note that there is no risk of death or injury involved in the act of sperm donation and that compensated sperm donation is, in fact, an accepted practice.

In demonstrating the differences between sperm sales and organ sales, a great deal of emphasis has been placed on the commercialized sale of sperm as it exists in practice today. However, it is only when this practice is recognized in theory by replacing the outdated "service" characterization with a more accurate "vendor/buyer" sales analysis that the warranty of sperm will be possible.[85] Having distinguished sperm transactions from human blood and organ transactions, the final step in circumventing the outdated *Perlmutter* "service" characterization is to distinguish sperm from other human tissue transactions by showing that the policy reasons for prohibiting the sale and warranty of human tissues are not applicable to the sale and warranty of sperm.

C. Distinguishing Other Tissue Transactions

1. Tissue Transactions Which Threaten Human Life.—In April of 1988, the Reagan Administration enjoined the United States National Institute of Health from performing experiments involving human fetal tissue until the government could carefully study the legal, ethical, and medical consequences of fetal tissue donation and use.[86] The ban on the use of fetal tissue was based on the notion that various federal and state

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83. Hardiman, *supra* note 69, at 239.

84. *See, e.g.*, Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 U. MICH. J.L. REF. 1055 (1987); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); Theodore Silver, *The Case for a Post-Mortem Organ Draft and Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681 (1988).

85. *See supra* pp. 14-18.

86. Ania M. Frankowska, *Fetal Tissue Transplants: A Proposal to Amend the Uniform Anatomical Gift Act*, 1989 U. ILL. L. REV. 1095-96 (1989).

laws regulating the use of aborted fetuses provided "improper incentives that may encourage a woman to get pregnant for the sole purpose of aborting the fetus . . . or to abort a fetus she otherwise would carry to term."[87] Subsequent investigations of the "fetal tissue market" yielded the following results: (1) experts prefer electively aborted fetuses to spontaneously aborted fetuses because the tissue is generally healthier; (2) dangerous hysterectomies are preferred to safer forms of abortion such as dilation and evacuation, because the type of abortion procedure employed greatly affects the condition of the fetal tissue; and (3) carefully timed abortions are preferable to natural abortions, because there is some evidence that the use of fetal tissue to cure various diseases is directly linked to the nature of the fetus at specific stages of development.[88]

On the basis of these findings, President Reagan sought to enforce the government's interest in protecting the lives of the mother and fetus by signing an amendment to the National Organ Transplant Act prohibiting the sale of human fetal tissue and organs for subsequent transplantation and prohibiting the transfer of fetal tissue and organs in interstate commerce.[89] President Reagan's amendment to the Transplant Act was later supplemented by the Bush Administration, which imposed an indefinite extension on the ban on federally funded research involving fetal tissue.[90]

These federal limitations on the sale of fetal tissue legitimize, in part, those state statutes which explicitly refuse to recognize the sale and warranty of "human tissue."[91] However, for the purpose of distinguishing sperm transactions from fetal tissue transactions, it is essential to note that the federal government did not find it necessary to restrict the sale of replenishable tissues such as blood and sperm.[92] This explicit omission was most likely due to the fact that a state's interest in protecting human life does not arise in the context of sperm transactions. Therefore, unless

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87. *Id.* at 1096.

88. *Id.* at 1098.

89. *Id.* at 1104. In its original state, the term "organ" as defined by the National Organ Transplant Act did not include tissue. *Id.*

90. *Id.* at 1096. The actions taken by the Bush and Reagan Administrations were sharply criticized by prominent physicians and researchers, *id.* at 1096 n.17, because human fetal transplantation has proven to be effective in treating diabetes and immunodeficiency diseases and, with more research, could prove helpful in treating other diseases such as Parkinson's disease, Alzheimer's disease, Huntington's disease, hemophilia, strokes, and some forms of cancer. *Id.* at 1095. In voicing his opposition to the ban on fetal tissue, one physician was quoted as saying, "This ban interferes with research, with new knowledge that is going to save lives of fetuses, babies, and adults as well." *Id.* at 1096 n.17. Despite the need for medical research involving human fetal tissue, the government has not yet lifted its ban on the use of fetal tissue in federally funded research projects.

91. *See* statutes cited *supra* note 38.

92. *See supra* note 89 and accompanying text.

there is an additional legitimate governmental interest which would be furthered by prohibiting the sale and warranty of sperm, the term "human tissue" as it appears in restrictive state statutes should not be interpreted as including sperm.

2. Tissue Transactions Which Hinder Medical Research.—Another governmental interest served by precluding the sale of human tissue is the pressing need for medical research involving tissue which historically has been donated or discarded rather than sold. The need for medical research recently was addressed in *Moore v. Regents of the University of California*,[93] a 1990 California case challenging the non-consensual use of a patient's surgically removed tissue for commercial research purposes on the theory of conversion.

In *Moore*, the trial court sustained the defendants' demurrers to a claim for conversion,[94] but the California Court of Appeal reversed, holding that the cause of action for conversion was valid because an individual has a tangible property right in his tissue.[95] The appellate court decision prompted a great deal of controversy in the medical research community. Consequently, the California Supreme Court reversed the decision despite "the seeming injustice in a result that denies a plaintiff a claim for conversion of his body tissue, yet permits defendants to retain the fruits thereof."[96] In holding that the patient did not retain an ownership interest in his cells following their removal, the court stated:

> Research on human cells plays a critical role in medical research. This is so because researchers are increasingly able to isolate naturally occurring, medically useful biological substances and to produce useful quantities of such substances through genetic engineering . . . *The extension of conversion law into this area would hinder research by restricting access to the necessary raw materials.*[97]

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93. 793 P.2d 479, 495 (Cal. 1990) [hereinafter *Moore II*]. In this case, a patient sued his physician and two biotechnology firms for using his tissue to develop a profitable patented cell line without his informed consent. After the patient's spleen had been removed, he made approximately 12 follow-up visits from his home in Seattle to his doctor's office in Los Angeles for additional blood work. Although the patient believed that these visits were treatment-related, the actual purpose of the visits was to enhance the physician's research in the development of a cell line derived from the patient's tissue.

94. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 502 (Cal. Ct. App. 1988) [hereinafter *Moore I*].

95. *Id.* at 503-04. In its holding, the appellate court did not decide whether the transfer of human tissue should be gift-based or market-based but instead left that decision to future controversies on a case-by-case basis. *Id.* at 504.

96. *Moore II*, 793 P.2d at 498.

97. *Id.* at 494 (emphasis added).

On the basis of this holding, it is clear that the pressing need for medical research was a key factor in the California Supreme Court's determination that the sale of surgically removed human tissue is not legally permissible. This judicial decision also legitimates, in part, those state statutes which refuse to recognize the sale and warranty of human tissue.[98] However, it is essential to note that the court in *Moore* explicitly stated, "While *we do not purport to hold that excised cells can never be property for any purpose whatsoever* . . . we conclude that the use of excised human cells in medical research does not amount to a conversion."[99] Thus, it can be inferred that while the sale of human tissue for research is not legally permitted, the sale of human tissue for other purposes may be permissible. Because the sale of sperm does not hinder medical research and does not obstruct enforcement of any other legitimate governmental interest, it appears that the sale of sperm would fall into the *Moore* court's category of legally permissible tissue sales.

D. Summary: Replacing the Outdated "Service" Characterization with a More Accurate "Vendor/Buyer" Sales Analysis

The foregoing section of this Note illustrated that the universal characterization of human tissue transactions as "services" rather than "sales" is far from accurate. Although it may be socially desirable to keep this legal fiction intact in those instances where an underlying governmental interest would be furthered by precluding the sale and warranty of certain human organs and tissues, it is neither logical nor prudent to persist in characterizing human sperm transactions as "services" when sperm is legally bought and sold on a daily basis without issue. As one Florida court stated, it is a "distortion to take what is at least arguably, a sale, twist it into the shape of a service, and then employ this transformed material in erecting the framework of a major policy decision."[100]

The legal acknowledgment that sperm transactions are, in fact, "sales" would ultimately prove to be in society's best interest, because the warranty of sperm under the U.C.C.'s vendor/buyer sales analysis would serve as a means of regulating the practice of artificial insemination where legislation thus far has failed. To illustrate how the U.C.C. would apply to sperm sales and to lend precedential support to the sperm warranty argument, the following section analogizes commercial sperm banks to commercial blood banks which previously have been held liable for breach of implied warranties.

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98. *See* statutes cited *supra* note 38.

99. *Moore II*, 793 P.2d at 493 (emphasis added).

100. Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 752 (Fla. Dist. Ct. App. 1966) *modified*, 196 So. 2d 115 (Fla. 1967).

III. Lending Support to the Sperm Warranty Argument

A. The Commercial Blood Bank Precedent

In response to the inequitable shield of immunity which resulted from the *Perlmutter* characterization of blood transactions as "services" rather than "sales," several cases have held that the transfer of blood from a commercial blood bank to a hospital or patient for consideration is actually a "sale" rather than a "service."[101] This more accurate characterization consequently allowed an injured plaintiff to state a valid cause of action against a commercial blood bank for breach of implied warranty.

One of the landmark cases in this area is *Russell v. Community Blood Bank, Inc.*.[102] In *Russell*, the plaintiff contracted serum hepatitis following a blood transfusion supplied by a commercial blood bank and later sued the blood bank for breach of the implied warranties of fitness and merchantability. The trial court dismissed the complaint because other jurisdictions had characterized blood transactions as "services" rather than "sales," and absent a sale, implied warranties do not apply.[103] In reversing this decision, the District Court of Appeal of Florida, Second District, held that a plaintiff can state a cause of action against a blood bank for breach of implied warranty.[104] However, the district court limited recovery to those injuries caused by defects which could have been detected or removed with available technology.[105] The Supreme Court of Florida affirmed the decision of the district court in part, but held that the court's ruling on the detection issue was premature.[106] In arriving at its decision to affirm, the Supreme Court of Florida recognized the need to limit legal liability in the medical profession, but the Court also found that there is "a distinction between a suit against a blood bank as opposed to a hospital, despite existing authority to the contrary."[107]

In a concurring opinion, Justice Roberts found:

> A transaction whereby a blood bank, which is engaged in the business of collecting and distributing blood, transfers title to the commodity to a patient for a consideration is unquestionably a 'sale,' whether tested by the law in effect at the time of the transaction . . . or by the new Uniform Commercial Code.[108]

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101. *See supra* note 56 and accompanying text.
102. 185 So. 2d 749 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).
103. 185 So. 2d at 750.
104. *Id.* at 755.
105. *Id.*
106. 196 So. 2d at 118.
107. 185 So. 2d at 752.
108. 196 So. 2d at 118 (Roberts, J., concurring).

The concurring opinion in *Russell* was later echoed by the majority opinion in *Carter v. Inter-Faith Hospital of Queens*,[109] a 1969 New York case which held that a commercial blood transaction is a "sale" pursuant to section 2-314 of the U.C.C. and that a commercial blood bank clearly is a "merchant" with respect to the sale of the blood, so the implied warranties of merchantability and fitness attach to the sale.[110]

Unlike the courts in *Russell* and *Carter*, some courts were reluctant to apply the U.C.C. to commercial blood transactions because technology had not advanced to the point that the hepatitis strain could be completely avoided.[111] As one author put it:

> Up to the time of the *Carter* decision, the courts . . . had to balance the social interest for the safety of the individual with the interests of the hospital and blood bank (in light of the absence of an adequate test to determine the presence of hepatitis in the blood) and the interests of the general public in assuring the ready availability of blood for medical treatments.[112]

Although the scales previously had tipped in favor of the hospital and commercial blood bank, the author noted a series of changes which took place around the time of the *Carter* decision in 1969 that would greatly affect the liability of commercial blood banks in the future.[113] Among the factors which the author predicted would be considered by courts after *Carter* were: (1) the belief that the party best able to bear the risk of loss should do so, (2) the fact that liability insurance to protect hospitals and commercial blood banks was increasingly available, and (3) the fact that a new test to determine the presence of the hepatitis virus had been formulated.[114]

In analyzing the predictions of this author, it is interesting to note the suggestion that the availability of a test to determine the presence of the hepatitis virus would have a profound impact on future decisions. Both before and after the *Carter* decision, a recurrent issue in the long line of commercial blood bank cases has been the appropriateness and desirability of applying strict liability under the U.C.C. to commercial blood transactions absent medical technology to detect defects in blood samples. For instance, the district court in *Russell* found it necessary to offset the lack of medical technology by limiting recovery under implied

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109. 304 N.Y.S.2d 97, 100-01 (1969).

110. *Id.* at 100-01.

111. *See, e.g.*, Magrine v. Krasnica, 227 A.2d 539, 545 (N.J. Super. 1967).

112. Note, *Warranties — Blood Transfusions — Extension of Implied Warranties*, 38 FORDHAM L. REV. 830, 835 (1970).

113. *Id.*

114. *Id.*

warranty to those injuries "caused by failure to detect or remove a deleterious substance capable of detection or removal."[115] Upon reviewing this decision, however, the Supreme Court of Florida held that the district court had acted inappropriately in limiting recovery under implied warranty law because the new rule contradicted the historical basis of strict liability and could not be reconciled with those Florida cases which previously had held that a seller's knowledge of a defect is irrelevant to his liability for breach of implied warranty.[116]

Despite the historical view of strict liability espoused by the Florida Supreme Court, other courts have agreed with the Florida appellate court insofar as it recognized the need to modify the traditional strict liability rule.[117] In fact, one court went so far as to indicate that while the *Perlmutter* "service" characterization may not be accurate, it is possible to rationalize the doctrine solely on the ground that it precludes strict liability in those instances where it is impossible to detect the hepatitis strain in blood transfusions.[118]

Nonetheless, given the modern advances in medical technology, it is difficult to understand why some states continue to recognize the *Perlmutter* "service" characterization with respect to commercial blood bank transactions. As one physician stated after *Perlmutter* was rejected in *Russell* and *Carter*, "It is hoped now that the shield of immunity once provided by *Perlmutter* has been removed, that blood banks will exercise more caution in the selection of donors and processing of blood to insure a higher degree of safety to the patient receiving the blood as a transfusion."[119] Because application of the U.C.C. almost certainly would compel commercial blood banks to exercise greater care in testing blood products to ensure consumer safety, it seems regressive that several states have statutorily reinstated the "shield of immunity" provided by the *Perlmutter* doctrine.[120]

Notwithstanding the merits of this argument, given the immediate life-saving need for blood and its quick deterioration rate, there is some validity for applying *Perlmutter* as a shield when there is not sufficient time to test the blood for defects. Also, because it is essential to account for the interests of the public in guaranteeing the availability of blood for medical treatment, it may be too great a risk to hold commercial blood banks strictly liable for defects when there is a possibility that such

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115. Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 755 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).

116. 196 So. 2d at 119.

117. *See, e.g.*, Magrine v. Krasnica, 227 A.2d 539, 545 (N.J. Super. 1967).

118. *Id.*

119. Dugas, *supra* note 47, at 237.

120. *See supra* pp. 18-24.

liability would drive blood banks out of business and leave the public without the blood which they desperately need.[121]

However, as Section III of this Note makes clear,[122] sperm transactions can be distinguished from other human organ and tissue transactions on the grounds that the sale of sperm is not detrimental to any underlying governmental interest, such as assuring that adequate blood supplies are available to the public, or protecting potential organ and tissue donors from any bodily harm which might result from the sale of their body parts. Moreover, eliminating the fictional *Perlmutter* doctrine with regard to commercial sperm transactions would be in society's best interest because the warranty of sperm under the U.C.C. would serve as a means of regulating the practice of artificial insemination where legislation has failed.

Having demonstrated how warranty law operates in the context of commercial blood transactions, it is necessary to illustrate how it would operate in the context of sperm transactions.

B. The Application of Warranty Law to the Sale of Sperm

Despite significant advances in medical technology over the past quarter-century, the detection and prevention of genetic defects and diseases is not one hundred percent. Therefore, the debate over the desirability of applying strict liability to commercial blood transactions will inevitably arise in the context of commercial sperm transactions as well. Although there are a variety of tests capable of detecting many diseases and genetic defects in sperm donors, a child could still be born with a defect or disease despite every possible precaution on the part of the sperm bank and physician. Thus, if strict liability in its traditional form were applied to commercial sperm transactions, the result would be a virtual "warranty on human life." Because of the moral and ethical opposition which necessarily would follow such a proposition, modification of strict liability is in order.

Modification of implied warranty law previously had been suggested in the closely related area of commercial blood transactions, but the proposed modification ultimately was rejected because it contravened the historical basis of liability without regard to fault.[123] While the urgent need for the testing of blood products to ensure consumer safety has since been answered statutorily, there is still an immediate need for regulation in the area of artificial insemination which has not been met

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121. *But see* statutes cited *supra* note 18 (mandating AIDS testing for blood and semen, with civil and criminal penalties for noncompliance).

122. *See supra* pp. 18-39.

123. *See supra* notes 115-16 and accompanying text.

sufficiently through legislation,[124] but which could be met through a modified application of implied warranty law. Despite the need for stability and predictability in the law, it seems counterproductive and inherently unjust to prohibit such a vital change on historical grounds alone. While it may be desirable to insist on liability without regard to fault in most sales transactions, the sale of sperm presents a unique problem in that its application, without modification, necessarily implies the possibility of commercially guaranteeing the quality of human life. In order to circumvent such a problem, public policy dictates the need for a carefully defined exception to strict liability in the context of sperm sales.

The most logical response to the need for modification is the ratification of the approach of the Florida appellate court in *Russell*. The *Russell* court suggested that recovery under implied warranty should be limited only to those injuries "caused by failure to detect or remove a deleterious substance capable of detection or removal."[125] The imposition of such a standard presumably would not be detrimental to those sperm banks which thoroughly screen their donors before using their sperm, but it inevitably would compel those sperm banks which do not currently test for defects and diseases to cautiously screen their prospective donors in the future in order to avoid liability under the implied warranties of fitness and merchantability.

A 1987 Idaho statute also supports the sperm warranty argument and illustrates how the strict liability exception might be applied in practice.[126] The Idaho statute provides that "a paid blood, organ or tissue donor, or a blood, organ or tissue bank operated for profit" may be held liable under the implied warranties of merchantability, except that "*the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of standard established scientific procedures or techniques.*"[127]

The enactment of similar statutes by those states which currently preclude the sale and warranty of sperm certainly would compensate for the current lack of regulation in the area of artificial insemination. Unfortunately, few states have followed Idaho's lead in applying the implied warranties of merchantability and fitness to sperm transactions.[128] Because the enactment of such statutes would not involve the development of an

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124. *See supra* note 13.

125. Russell v. Community Blood Bank, Inc., 185 So. 2d 749, 755 (Fla. Dist. Ct. App. 1966), *modified*, 196 So. 2d 115 (Fla. 1967).

126. IDAHO CODE § 39-3702 (1987).

127. *Id.* (emphasis added).

128. However, two states which have enacted statutes similar to Idaho's are Iowa and South Dakota. *See* statutes cited *supra* note 49.

entire body of comprehensive legislation dealing with controversial methods of new reproductive technology, it is likely that legislators will be more apt to ratify a broad implied warranty provision similar to the one recently adopted in Idaho long before they are able to agree on a specific body of regulations dealing exclusively with the artificial insemination process.[129]

Moreover, even if legislation governing the artificial insemination process is enacted in the near future, application of warranty law remains a crucial regulatory device whereby severe economic sanctions may be levied against sperm banks and physicians for failure to comply with specific state regulations where their noncompliance causes the injury of a donee or a donee's child. In this sense, the warranty of sperm will prevent those transgressions of the law which otherwise would be economically efficient.[130]

IV. Conclusion

As medical technology advances, more and more infertile couples are able to procreate using various methods of artificial reproduction. Unfortunately, in the area of artificial insemination, practitioners in most states are allowed to forego precautionary measures which would significantly reduce the risk of donor mix-ups, diseases, and birth defects because uniform professional standards regulating the industry have not yet been adopted. Given the controversy surrounding the propriety of artificial reproduction, an expeditious legislative solution to this problem is not likely to be forthcoming. Therefore, an alternate mechanism is needed to increase the accountability of physicians and sperm banks under the current system.

Applying Article 2 of the Uniform Commercial Code to sperm transactions would meet this need by providing economic disincentives sufficient

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129. *See supra* note 13.

130. The following is a brief outline of how the U.C.C. would operate in the context of commercial sperm transactions.

Step 1: Establish that the sperm transaction is a "sale" pursuant to U.C.C. section 2-106(a). *See supra* pp. 14-18.

Step 2: Establish that the sperm bank is a "merchant" with respect to the sale of the sperm pursuant to U.C.C. section 2-104(1). *See supra* pp. 21-23.

Step 3: (A) If the injury is the result of a donor mix-up, state a claim for breach of express warranty pursuant to U.C.C. section 2-313. *See supra* pp. 1-4.

or (B) If the injury is the result of a genetic defect or disease which could have been detected with available medical technology, state a claim for breach of the implied warranties of merchantability and fitness pursuant to U.C.C. section 2-314 and 2-315.

Step 4: If a physician or hospital acted as an intermediary in the transaction between the sperm bank and the patient, and there is a statutory provision shielding the medical community from legal liability in the jurisdiction in which the action is brought, establish that the injured plaintiff is entitled to recover directly from the sperm bank as a third party beneficiary pursuant to U.C.C. section 2-318. *See supra* pp. 23-24.

to compel preventative measures in the industry. It is hoped that the benefits and safeguards proposed in this Note will incite state legislators to act—both by adopting the guidelines suggested by the American Fertility Society specifically regulating the practice of artificial insemination and by characterizing sperm transactions as "sales" rather than "services" so that liability for improper artificial insemination will attach under warranty law.

Personal Liability for Bank Directors Who Violate Lending Limit Statutes: Has Indiana Followed Congress' Lead?

Mitchel Mick*

Introduction

Statutes limit the amount banks may lend to any single borrower.[1] A number of bank failures can be traced to losses resulting from loans made in violation of the bank's own lending policies or in violation of banking laws.[2] Regulatory agencies have the authority to take action

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1. The Indiana lending limit statute provides in pertinent part that:

> (a) The total loans and extensions of credit by a bank to a person outstanding at one (1) time and not fully secured, as determined in a manner consistent with subsection (b), by collateral having a market value at least equal to the amount of the loan or extension of credit may not exceed fifteen percent (15%) of the unimpaired capital and unimpaired surplus of the bank.
>
> (b) The total loans and extensions of credit by a bank to a person outstanding at one (1) time and fully secured by readily marketable collateral having a market value, as determined by reliable and continuously available price quotations, at least equal to the amount of the funds outstanding may not exceed ten percent (10%) of the unimpaired capital and unimpaired surplus of the bank. The limitation in this subsection is separate from and in addition to the limitation contained in subsection (a).

Ind. Code § 28-1-13-1.5 (Supp. 1992).

The national legal lending limit as defined in the Garn-St. Germain Depository Institutions Act of 1982 provides (with some exceptions):

> The total loans and extensions of credit by a national banking association to a person outstanding at one time and not fully secured . . . by collateral having a market value at least equal to the amount of the loan or extension of credit shall not exceed 15 per centum of the unimpaired capital and unimpaired surplus of the association.

12 U.S.C. § 84(a)(1) (1988).

2. A loan made in excess of the bank's legal lending limit is not itself an inherently risky loan. However, when combined with the accompanying failure to ensure adequate credit safeguards, the loan has the potential for disaster. A 1988 study conducted by the Office of the Comptroller of the Currency, analyzing 162 failures of federally chartered banks since 1979, found that 81% of these banks had non-existent or poorly followed loan policies; 59% had inadequate loan identification systems; and 69% had insufficient safeguards to ensure compliance with internal policies and banking laws. Stephen H. Collins, *National Bank Failures Studied in OCC Report*, 165 J. Acct. 80 (1988). This OCC study predated Congress' effort to reform banking laws by its adoption of the

against directors who violate statutory lending limits.[3]

The Indiana banking statutes, like those of many other states, are analogous to the federal banking statutes in that they allow the regulatory agency to require the bank directors to "take affirmative action" to correct conditions resulting from a violation of applicable law.[4] Some federal courts have denied federal regulatory agencies the authority to require reimbursement from directors under the "take affirmative action" clause, absent specific language authorizing reimbursement.[5]

Federal and state banking regulators also have the authority to assess civil monetary penalties against directors who violate their bank's legal lending limit. The assessment of penalties is a deterrent measure and does not compensate a bank for any resulting loss.

The parties who have standing to sue to require reimbursement from directors for losses occurring on a loan made in excess of the bank's lending limit, most commonly the shareholders or a party who lost money as a result of the violation, often do not know that a violation has occurred. The Indiana Department of Financial Institutions (DFI) may only disclose examination information to certain persons.[6] Bank

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Financial Institutions Reform, Recovery and Enforcement Act of 1989.

In 1991 alone, there were 123 bank failures. *Five More Bank Failures Raise 1991 National Total to 123*, BNA BANKING REP., Dec. 23, 1991, at 1046. It may forever be unknown how great a role the economy played in causing these recent failures in relation to the impact that mismanagement had on bringing about the failures. In any event, regulatory reforms at the national level must be given time to work and antiquated banking laws at the state levels must be brought up to date to avoid a great disparity between the powers of federal and state regulatory agencies.

3. State and federal statutes allow the assessment of civil monetary penalties, removal from office, orders to cease and desist from the violation, and requiring affirmative action to correct the conditions resulting from the violation. 12 U.S.C. §§ 93, 1818 (1988 & Supp. II 1990); IND. CODE § 28-11-4-7 (Supp. 1992); MO. ANN. STAT. § 361.261 (Vernon Supp. 1991); OHIO REV. CODE ANN. § 1125.08 (Anderson 1988); MICH. COMP. LAWS ANN. § 487.335 (West 1987).

4. IND. CODE § 28-11-4-7 (Supp. 1992); ILL. ANN. STAT. ch.17, para. 7311-1 (Smith-Hurd Supp. 1992); KY. REV. STAT. ANN. § 287.690 (Michie/Bobbs-Merrill 1988); MICH. COMP. LAWS ANN. § 487.335 (West 1987); MO. ANN. STAT. § 361.260 (Vernon Supp. 1992); OHIO REV. CODE ANN. § 1125.08 (Anderson 1988).

5. *See, e.g.*, Larimore v. Comptroller of Currency, 789 F.2d 1244 (7th Cir. 1986).

6. The Indiana General Assembly has limited the persons to whom the DFI may provide examination information:

> Except as otherwise provided, a member of the department or the director or deputy, assistant, or any other person having access to any such information may not disclose to any person, other than officially to the department, by the report made to it, or to the board of directors, partners, or owners, or in compliance with the order of a court, the names of the depositors or shareholders in any financial institution, or the amount of money on deposit therein at any

regulators conduct examinations on a regular schedule and have ready access to the information to detect violations. Limitations on disclosure of examination information effectively reduces the possibility that a party other than the DFI will obtain the information necessary to bring suit against the bank directors.

Requiring reimbursement from the bank directors before the bank has become insolvent is a prudent remedy that regulators should utilize more often. Replenishing the bank of funds lost through lending limit violations minimizes the snowball effect of a shrinking capital base initially caused by losses suffered from loans made in excess of the bank's legal lending limit. If the regulators must wait until the bank becomes insolvent before suing the bank directors, further harm results from the expense and delay in revoking the bank's charter.[7]

Not every bank director may have the funds to reimburse the bank for losses sustained on a loan made in excess of the legal limit. However, the potential of personal liability should provide more deterrence than the mere imposition of civil monetary penalties. In situations in which

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time in favor of any depositor, or any other information concerning the affairs of any such financial institution.

IND. CODE § 28-1-2-30 (Supp. 1992). Further:

The director may disclose or make available to a:
(1) state or federal law enforcement agency;
(2) state or federal financial institution supervisory agency;
(3) state or federal prosecutorial agency; or
(4) private insurer of deposits accounts or share accounts of a financial institution;
confidential information described under IC 28-1-2-30.

Id. § 28-11-3-3 (Supp. 1992)

7. Prior to 1966, the remedies available to federal regulators consisted of termination of the bank's deposit insurance or seizing control of the bank. Because these remedies were too drastic in many instances, Congress enacted 12 U.S.C. § 1818(b), allowing the issuance of cease and desist orders against banks. (This section was amended in 1978 to allow cease and desist orders to be issued against "any director, officer, employee, agent or other person participating in the affairs of such bank.") A senate report to the 1966 act, that the court in *Larimore v. Comptroller of Currency* found did not reveal legislative intent to allow the OCC to assess personal liability, states:

> [I]t is essential that the federal supervisory agencies have the statutory and administrative facility to move quickly and effectively to require adherence to the law and cessation and correction of unsafe or improper practices . . . . Existing remedies have proven inadequate. On the one hand they may be too severe for many situations, such as taking custody of a institution or terminating its insured status. On the other hand they may be so time consuming and cumbersome that substantial injury occurs to the institution before remedial action is effective.

Larimore, 789 F.2d at 1250 (quoting S. REP. No. 1482, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532, 3536-37).

the bank director does have the funds to reimburse the bank for losses resulting from lending limit violations, the bank will be able to recover from the adverse effects of the violation. In Indiana, a bank may not indemnify a director when the DFI imposes a civil monetary penalty against a director.[8]

A violation of the bank's legal lending limit and a failure of the directors to investigate excessive loans may indicate the directors committed intentional violations of applicable banking laws.[9] When a lending limit violation occurs, the bank director may be liable for the full amount of the loan, not just the amount in excess of the lending limit.[10] The bank director may be liable for large sums of money because a loan (or an aggregate of loans) made in excess of the bank's legal lending limit is typically a large loan.

This Note will analyze to what extent the DFI may bring suit in its own name against bank directors who have violated a bank's legal lending limit with the resulting loans causing a loss to the bank. Section I provides a brief overview of the banking regulatory system as it exists today. Section II analyzes the current statutory language in Indiana. Section III analyzes federal banking statutes that are analogous to the current Indiana banking statutes. Section IV analyzes other states' banking statutes that are analogous to the Indiana and federal banking statutes. Section V proposes that the DFI, before taking possession and appointing the Federal Deposit Insurance Corp. (FDIC) as receiver, be authorized to bring suit in its own name requesting reimbursement from bank directors who have violated lending limit statutes.

I. Background of the Banking Regulatory System

A bank may either be chartered by the state in which it is located or by the federal government. A bank chartered under federal law is a "national bank" and is under the supervision and examination of the Office of the Comptroller of the Currency (OCC).[11] A bank chartered under the laws of the state in which it is located is deemed a "state bank." State-chartered banks may be members of the Federal Reserve System (FRS), in which case they are subject to supervision and examination by the FRS and the state chartering authority.[12] State-chartered banks may also be insured by the Federal Deposit Insurance Corp.

8. Ind. Code § 28-11-4-9(c) (Supp. 1992). Currently, no statute exists which explicitly allows a bank to purchase and maintain insurance to cover civil monetary penalties assessed under Title 28.

9. Cache Nat'l Bank v. Hinman, 626 F. Supp. 1341, 1343 (D. Colo. 1986).

10. *See* Corsicana Nat'l Bank v. Johnson, 251 U.S. 68, 87 (1919).

11. P. Michael Davis & Rodney G. Alsup, *Kentucky Bank Directors Liability*, 11 N. Ky. L. Rev. 285, 285 (1984) (quoting Edward W. Reed et al., Commercial Banking (1976)).

12. *Id.*

(FDIC), in which case the regulators are the FDIC and the state chartering authority.[13] If a state-chartered bank is a member of the FRS and the FDIC, the FRS is the designated federal regulator. State banks that are members of the FRS or insured by the FDIC are subject to state laws and regulations, as well as applicable federal laws.[14]

Each of these regulatory agencies has a somewhat different interest in enforcement. The FDIC, as an insurer of bank deposits, has a financial interest in the solvency of each insured bank. In regulating national banks, the OCC works to assure the safety and soundness of the banking system, although the OCC does not have the same financial interest as the FDIC because the OCC is not an insurer of bank deposits. State banking departments generally do not insure bank deposits. Therefore, a state banking department's interest in regulating banks, and the OCC's interest, are closely aligned. A state banking department's primary function is to ensure the soundness of the financial institution and the stability of the state's financial system.[15]

The regulatory agencies examine banks to ensure compliance with banking laws. Regulators assure adequate and proper financial services; protect the interests of depositors, borrowers, shareholders, and consumers; and promote the safety and soundness of financial institutions.[16] Regulatory agencies should be given broad powers to carry out their duties to protect the public's interest.[17]

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13. *Id.*

14. *Id.*

15. "The department is an agency of the state, vested with power to act for the protection of the interests of all parties, including the public." Budnick v. Citizens Trust & Sav. Bank, 44 N.E.2d 298, 302 (Ind. 1942).

Actually, the definition given of the function of the state banking department may determine the actions that the banking department may take as a means to its ends.

The dual banking system originated with the landmark case *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In today's dual banking system, with federal deposit insurance, some may argue that the primary function of state banking departments is to administer the chartering, branching, and mergers and acquisitions of banks. However, absent a wholesale discharge of the dual banking concept, state regulators retain the authority to fully regulate state chartered banks.

16. INDIANA DEP'T. OF FIN. INST., MISSION STATEMENT OF THE INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS (1987) (on file with author).

17. The Michigan Legislature has gone so far as to formalize its banking department's obligation to the public by enacting a statute indicating the department's goals. The statute provides in pertinent part:

> It is the policy of this state that the business of all banking organizations shall be supervised and regulated in such manner as to insure the safe and sound conduct of such business, to conserve their assets and to eliminate unsound and destructive competition among such banking organizations and thus to maintain public confidence in such business and protect the public interest and the interests of depositors, creditors and shareholders.

MICH. COMP. LAWS ANN. § 487.302 (West 1987)

The OCC has specifically been given the authority to bring suit in its own name against directors in their individual capacities who violate federal banking laws.[18] The other federal regulatory agencies have been given the authority to seek reimbursement from directors personally only by issuing a final order requesting such reimbursement.[19] In Indiana, no reported cases exist wherein the DFI, before becoming a receiver, sought reimbursement from bank directors for losses on loans made in excess of the bank's legal lending limit.

II. Indiana Statutes May Allow the Department of Financial Institutions to Require Reimbursement from Bank Directors

In Indiana, no explicit statute exists, as exists for the OCC at the national level, which allows the DFI to sue directors in their individual capacities for losses resulting from loans made in excess of the bank's lending limit. If the courts liberally interpret the current Indiana banking statutes, the DFI may have the authority to request reimbursement before the bank is placed into receivership.[20]

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18. 12 U.S.C. § 93 (1988 & Supp. II 1990). *See infra* text accompanying note 47. The legislative history of this provision does not indicate why Congress would give the OCC standing to bring suit when the OCC does not have a financial interest in the viability of a financial institution.

The original bill that eventually became 12 U.S.C. § 93 contained the words "United States" in lieu of "Comptroller of the Currency". The congressional debate surrounding the insertion of "Comptroller of the Currency" was mostly concerned with avoiding a large number of similar actions being brought against a single bank in different jurisdictions. Congress wanted to consolidate the number of actions that could be brought against a financial institution by vesting such cause of action in the Comptroller of the Currency. Cong. Globe, 38th Cong., 1st Sess. 1989-90 (1864).

19. Congress has provided:

> If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof.

12 U.S.C. § 1818(b)(1) (Supp. II 1990).

20. The seriousness of bank failures and the importance of maintaining a financially sound financial system indicate that courts should be encouraged to broadly construe the DFI's authority.

In Indiana, only the DFI has the authority to issue a final order, and the DFI may seek enforcement of the order by applying to a "court having jurisdiction."[21] A court may "stay, modify, or vacate a final order."[22] A court may only alter a final order if the agency acted in a capricious or arbitrary manner, abused its discretion, or acted in excess of statutory authority.[23]

The DFI may require bank directors to "take affirmative action to correct the conditions resulting from the practice or violation."[24] Requiring directors to provide reimbursement for losses sustained as a result of lending limit violations requires the directors to correct the condition resulting from the violation. Thus, the statute appears to allow a reimbursement order issued by the DFI. Shareholders may sue directors in their individual capacity for reimbursement. Therefore, the DFI, which by statute cannot disclose examination information to shareholders, should be allowed to bring suit. The Indiana banking statutes do not provide a definition for the appropriate remedies allowable under the "take affirmative action" clause, despite an analogous federal statute that does provide such a definition.

Because of the recent enactment of the "take affirmative action" clause in Indiana, no cases interpreting the clause have been reported, nor are there any cases in which the DFI has sought to bring suit against directors personally for lending limit violations. The "take affirmative action" clause does not appear to preclude a reimbursement action. Prior to the amendment of the federal banking statutes, some federal

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21. IND. CODE § 28-11-4-10 (Supp. 1992).
22. *Id.* § 28-11-4-8(c).
23. Department of Fin. Inst. v. State Bank, 252 N.E.2d 248, 251 (Ind. 1969).
24. The amended language states:

(a) If upon the record made at a hearing under this chapter the department finds that the conditions specified in section 2 or 3 of this chapter have been established, the department may issue a final order.
(b) A final order must include separately stated findings of fact for all aspects of the order, including any remedy under subsection (c). Findings of ultimate fact must be accompanied by a concise statement of the underlying basic facts of record to support the findings.
(c) A final order may do any of the following:
(1) Require the financial institution and its directors, officers, employees, and agents to do any of the following:
(A) Cease and desist form the practice or violation.
(B) Take affirmative action to correct the conditions resulting from the practice or violation.
(2) Permanently remove a director or an officer.
(3) Impose a civil penalty not to exceed the amount specified in section 9 of this chapter. . . .

IND. CODE § 28-11-4-7(c)(1)(B) (Supp. 1992).

courts held that the federal regulatory agencies could not order reimbursement under federal statutes analogous to the current Indiana statute.[25]

In the same bill providing the "take affirmative action" clause, the Indiana General Assembly gave the DFI the authority to assess civil monetary penalties against a director of a bank.[26] A penalty may be assessed when a bank director commits a violation of a statute, rule, or final cease and desist order and, either the "financial institution has suffered or will probably suffer substantial financial loss or other damage or, the interests of the financial institution's depositors could be seriously prejudiced by reason of the violation."[27] The General Assembly limited penalties to a maximum of $15,000 per director for each violation.[28]

Civil monetary penalties are punitive in nature and directed toward deterrence. The penalties do not compensate the injured party and do not alleviate the damage caused by violations of banking statutes. The amount collected in penalties goes to a state fund set aside for the

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25. Larimore v. Comptroller of Currency, 789 F.2d 1244, 1256 (7th Cir. 1986). It should be noted that at the time *Larimore* was decided, 12 U.S.C. § 1818 did not contain a definition of what "affirmative action" was appropriate. Congress subsequently amended 12 U.S.C. § 1818 to provide a definition for "affirmative action". *See infra* note 60.

26. A final order issued by the DFI may "[i]mpose a civil penalty not to exceed the amount specified in section 9 of this chapter." IND. CODE § 28-11-4-7(c)(3) (Supp. 1992). *See infra* note 28.

27. The Indiana General Assembly has provided that:

> If the director [of the DFI] determines that:
> (1) a director or an officer of a financial institution has:
> (A) committed a violation of a statute, rule, or final cease and desist order;
> (B) engaged or participated in an unsafe or unsound practice in connection with the financial institution;
> (C) committed or engaged in an act, an omission, or a practice that constitutes a breach of fiduciary duty as director or officer; or
> (D) been charged in a complaint, an indictment, or an information with commission of or participation in a crime involving dishonesty or breach of trust that is punishable by imprisonment for a term exceeding one (1) year under federal law or the law of a state; and
> (2) either:
> (A) the financial institution has suffered or will probably suffer substantial financial loss or other damage; or
> (B) the interests of the financial institution's depositors could be seriously prejudiced by reason of the violation, practice, or breach of fiduciary duty;
> the director may issue and serve upon the director or the officer a notice of charges of the practice, violation, or act.

IND. CODE § 28-11-4-3 (Supp. 1992).

28. "A civil penalty imposed on a director or an officer under section 7 of this chapter may not exceed fifteen thousand dollars ($15,000.00) for each practice, violation, or act found to exist in the final order." *Id.* § 28-11-4-9(a).

operations of the DFI.[29] Once a director violates a bank's lending limit, it becomes clear that the deterrent effect of penalties has failed.

Although the director may ultimately be assessed a penalty, the bank may remain in a weakened condition. Shareholders may lack knowledge of any wrongdoing on the part of the bank directors and never pursue a valid reimbursement action. Because the bank is not relieved of the financial burden placed on it as a result of the lending limit violation, the assessment of penalties is inadequate as a sole response to such violations.

In Indiana, once a bank is financially unsound, the DFI may take possession of the bank and bring suit against a bank director.[30] When the DFI takes over an institution, the DFI gains all the powers that a trustee obtains in a similar situation.[31] The receiver is given express authority to bring suit against directors in the name of the receiver for the enforcement of any right or claim that is vested in the financial institution or shareholders.[32]

When the bank deteriorates to the point that the DFI must take possession of it, the DFI's interest in the bank is not as great as that of a federal deposit insurer. The DFI has failed to satisfy its goal of assuring the soundness of the financial institution and must then focus on mitigating the damages caused by the bank failure. Because at this stage the DFI's interest is not very great, the DFI, in all probability, would not wish to incur the costs of pursuing litigation against the failed institution's directors. The FDIC, as insurer, has a much greater interest in pursuing the action at this stage in the proceedings.

The DFI could issue a formal order requiring the bank to seek reimbursement from the directors as an alternative way to ensure that the directors remedy their wrongs.[33] The statutory language that allows

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29. The Indiana statute provides in pertinent part: "Civil penalties shall be deposited in the *fund*." *Id.* § 28-11-4-9 (emphasis added). The fund is defined as "the financial institutions fund . . . ." *Id.* § 28-1-1-4. The money in the fund is used to pay expenses and compensation incurred by the DFI. *Id.* § 28-11-2-9. It should be noted that the operating budget of the DFI is supported by assessments to state chartered banks and is not dependent upon tax dollars. *Id.* § 28-11-3-5.

30. "[T]he department may take possession of the business and property of any financial institution . . . whenever it appears to the department that the financial institution . . . [h]as violated any statute . . . and that continued control of its own affairs threatens injury to the public, the financial community, its depositors, or other creditors . . . ." *Id.* § 28-1-3.1-2.

31. Old First Nat'l Bank & Trust Co. v. Scheuman, 13 N.E.2d 551, 561 (Ind. 1938).

32. IND. CODE § 28-1-3.1-15 (West 1988).

33. *See* Marcia J. Staff & Richard W. Staff, *Administrative Enforcement of Legal Lending Limits: National Bank Directors and the OCC's Tangled Web*, 106 BANKING L.J. 116, 126 (1989).

the DFI to require the bank to "take affirmative action" to correct conditions resulting from the violation of banking laws appears to contemplate an order to the bank to take such action. The DFI can require the bank to bring suit and accomplish indirectly what the DFI possibly could not do directly. However, should the bank fail in its suit, the additional litigation costs would add another financial burden to the already financially troubled bank. If the bank should be required to bring suit and then fail, the banking community will argue that bank regulation is inadequate and overly burdensome. Any additional regulation of the banking industry is certain to draw sharp criticism from the banking community.[34]

As indicated above, the DFI may bring suit against bank directors in their individual capacities after the DFI becomes the named receiver of the bank. This procedure is too time-consuming, costly, and extreme to be an effective remedy to cure the effects of a lending limit violation. The DFI may also assess penalties against bank directors who violate the bank's lending limit. Penalties do not compensate the bank for any loss that the bank has suffered on a loan made in excess of the bank's lending limit and are, therefore, not appropriate as the only remedy the DFI may utilize when a director has violated a lending limit. The most likely avenue for the DFI to pursue in suing bank directors in their individual capacities is to utilize the "take affirmative action" clause of the Indiana banking statutes. The DFI may then seek reimbursement from directors by requiring them to "take affirmative action" to correct the condition resulting from the directors' violation of the bank's lending limit.

III. Federal Statutes Analogous to the Indiana Statutes and Federal Cases Interpreting Those Federal Statutes

The current Indiana statute providing authority to issue a cease and desist order contains language analogous to the federal statute in existence prior to the adoption of the Financial Institutions Reform, Recovery

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34. One argument against allowing the DFI an additional cause of action against directors is that such an amendment will result in a scarcity of qualified bank directors. This argument is without merit because national bank directors have been exposed to reimbursement liability for lending limit violations since the National Bank Act of 1864 yet national banks do not appear to have had difficulty attracting qualified directors.

The nature of a lending limit violation would certainly bring itself to the attention of a director. Any loan or series of loans that approach a bank's legal lending limit are going to be of a sizable dollar amount. Directors, in the ordinary course of their duties, will be aware of large borrowers and increase the monitoring on such borrowers, not only to ensure that the amounts loaned do not exceed the bank's lending limit, but also as a matter of credit policy.

and Enforcement Act of 1989 (FIRREA). The conflicting interpretations of the "take affirmative action" clause of the federal statute by federal courts led Congress to define the appropriate "affirmative action" that bank regulators may require of bank directors.

The "take affirmative action" clause provides:

> In the event . . . the agency shall find that any violation . . . specified in the notice of charges has been established, the agency may issue . . . an order to cease and desist from any such violation or practice. Such order may . . . require the depository institution or its institution-affiliated parties . . . to cease and desist from the same, and further, to take affirmative action to correct the conditions resulting from any such violation or practice.[35]

At the federal level, prior to the 1989 adoption of FIRREA, two cases dominated the field in dealing with bank director liability.[36] The courts in these two cases took opposing views of the "take affirmative action" clause. The Ninth Circuit Court of Appeals, in *del Junco v. Conover*,[37] held that the OCC could request reimbursement from directors when a loan made in violation of the bank's legal lending limit resulted in a loss to the bank.[38]

In *del Junco*, the court reasoned that the OCC had "broad discretion to fashion a remedy" under 12 U.S.C. § 1818(b)(1).[39] The court held that "deference is due to the Comptroller's interpretation of the law under which he operates."[40] Previously, in *Groos National Bank v. Comptroller of Currency*,[41] the Fifth Circuit Court of Appeals held that "once the Comptroller finds a violation he may, within his allowable discretion, fashion relief in such a form as to prevent future abuses."[42] The court in *del Junco* interpreted the *Groos* holding as indicating that

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35. 12 U.S.C. § 1818 (b)(1) (Supp. II 1990). FIRREA made minor changes to this section. Prior to FIRREA, this section used "bank" instead of "depository institution", and "director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank" instead of "institution-affiliated party."

36. *See* Larimore v. Comptroller of Currency, 789 F.2d 1244 (7th Cir. 1986); del Junco v. Conover, 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

37. 682 F.2d 1338 (9th Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

38. *Id.* at 1344.

39. *Id.* at 1340.

40. *Id.* at 1344.

41. 573 F.2d 889 (5th Cir. 1978). The *Groos* case concerned a cease and desist order prohibiting loans that were being made in violation of an agreement between the OCC and the bank.

42. *Id.* at 897.

the Comptroller "has broad discretion to cure the *effect* of a violation."[43] In a 1990 opinion, after the adoption of FIRREA, the Ninth Circuit reaffirmed its *del Junco* decision.[44]

The Seventh Circuit, in *Larimore v. Comptroller of Currency*,[45] held that the OCC could not require reimbursement from directors under 12 U.S.C. § 1818(b)(1), but had to bring suit in federal court under 12 U.S.C. § 93(a) in order to seek reimbursement.[46] In *Larimore*, the OCC tried to order bank directors to reimburse the bank for losses resulting from loans made in violation of the bank's legal lending limit. The language of 12 U.S.C. § 93(a) provides:

> If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.[47]

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43. 682 F.2d at 1340 (emphasis added). *But see* Larimore v. Comptroller of Currency, 789 F.2d 1244, 1251 (7th Cir. 1986). In *Larimore*, the court interpreted the legislative history of 12 U.S.C. § 1818 as indicating that the OCC can only take action to prevent further deterioration of a situation. However, the court cited legislative history that reads: "[c]orrectly used, . . . these new powers can effectively enhance the ability of the financial institution regulatory agencies to cure unsafe or unsound situations." 789 F.2d at 1251. The court was more concerned that Congress did not expressly provide that the OCC could impose personal liability on a bank director. *Id.*

44. Hoffman v. Federal Deposit Ins. Corp., 912 F.2d 1172, 1175 (9th Cir. 1990).

45. 789 F.2d 1244 (7th Cir. 1986). Initially, a panel of the court affirmed the order of the OCC in Larimore v. Conover, 775 F.2d 890 (7th Cir. 1985). Although affirming the OCC's order, "[the] . . . panel failed to address the initial issue of whether the Comptroller, pursuant to § 1818(b)(1), had the authority to order the directors to indemnify the bank for potential losses arising from their approval of loans in excess of the statutory limit contained in 12 U.S.C. § 84." Larimore v. Comptroller of Currency, 789 F.2d at 1248.

46. 789 F.2d at 1256.

47. 12 U.S.C. § 93(a) (1988). The OCC can bring a separate action against the bank directors without bringing suit to declare the dissolution of the bank. In an early opinion, interpreting what is now 12 U.S.C. § 93(a), the Eighth Circuit stated:

It can scarcely be supposed that congress intended to frame a law which in a

Under 12 U.S.C. § 93(a), the OCC must bring suit in a federal court when ordering reimbursement from a director.[48] A cease and desist order under 12 U.S.C. § 1818 may be issued under the sole authority of the regulatory agency, and if the party opposes the OCC's order, the party may request an agency hearing.[49] The text of 12 U.S.C. § 1818 provides that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order."[50] This section precludes a court from intervening in a regulatory cease and desist order, except as otherwise provided in 12 U.S.C. § 1818. The court in *Larimore* concerned itself with the judicial review that followed the OCC's order. The court was concerned with the procedural safeguards surrounding the reimbursement action if the OCC was acting as the prosecutor, judge, and jury.[51] The court concluded that the OCC could not bring a similar action under another less explicit statute with less procedural safeguards, not only because Congress had already specifically allowed the OCC an avenue to require reimbursement, but because the statute under which the OCC could require reimbursement had the safeguard of requiring the cause to be heard in a federal court.[52] The court was unwilling to read into 12 U.S.C. § 1818(b)(1) an additional cause of action when Congress had already explicitly provided an avenue for a reimbursement order under 12 U.S.C. § 93(a).

The court in *Larimore* also relied upon the legislative history of 12 U.S.C. § 1818 in denying the OCC the power to require reimbursement under a cease and desist order issued pursuant to this section. The court reasoned that the legislative history of 12 U.S.C. § 1818 does not indicate Congress intended the OCC to assess personal liability against a bank director.[53] The court concluded that the statute giving the OCC the power to issue a cease and desist order is only to correct unsafe banking practices, and that the purpose behind 12 U.S.C. § 1818 is to provide the OCC with a method to prevent further deterioration of the financial

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> case of that kind would either compel the comptroller to forfeit the franchises of the corporation, or suffer its directors to escape liability for a plain violation of law . . . the forfeiture of a bank's franchise, in a suit brought by the comptroller for that purpose, is not, in our judgment, a condition precedent to the maintenance of a suit against its directors for excessive loans.

Cockrill v. Cooper, 86 F. 7, 13 (8th Cir. 1898).

48. 12 U.S.C. § 93(a) (1988).
49. *Id.* § 1818(i)(2)(H) (Supp. II 1990).
50. *Id.* § 1818(i)(1) (Supp. II 1990).
51. Larimore v. Comptroller of Currency, 789 F.2d 1244, 1249 (7th Cir. 1986).
52. *Id.* at 1252.
53. *Id.* at 1250

institution.[54] Courts are reluctant to allow a cause of action to be brought under 12 U.S.C. § 1818 when another statute specifically provides for such cause of action.

In *Citizens State Bank v. Federal Deposit Insurance Corp.*,[55] the court denied an FDIC order for reimbursement under 12 U.S.C. § 1818(b)(1) for violations of the Truth in Lending Act.[56] The court reasoned that the existence of another statute specifically addressing violations of the Truth in Lending Act precluded the FDIC's use of 12 U.S.C. § 1818(b)(1).[57]

Prior to the 1989 congressional amendment of 12 U.S.C. § 1818, the usual cases in which courts allowed federal regulatory agencies the authority to require reimbursement under the "take affirmative action" clause, involved bank officials being personally enriched from the illegal activities.[58] In cases of lending limit violations, it may be difficult to show personal enrichment of the bank official.

In 1989, Congress amended 12 U.S.C. § 1818 to provide a definition of the appropriate actions to be taken under the "take affirmative action" clause and specifically overruled *Larimore*.[59] Congress amended 12 U.S.C.

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54. *Id.* at 1251. The legislative history that the court relied upon provides: "Correctly used . . . these new powers can effectively enhance the ability of the financial institution regulatory agencies to cure unsafe or unsound situations." *Id.* (citing S. REP. No. 323, 95th Cong., 1st Sess. 7 (1977)).

55. 751 F.2d 209 (8th Cir. 1984).

56. *Id.* at 218.

57. The court stated:

> Congress in section 1640 circumscribed the liability of financial institutions by establishing a one-year statute of limitations, 15 U.S.C. § 1640(e) . . . § 1640(b), (c). Reimbursement under section 1818 would be free of all these restrictions so that a financial institution would not be able, as Congress intended, to avoid its liability in the given instance.

Id. When the legislature has specifically provided another avenue for the regulatory agency to pursue, the courts will not allow a broad interpretation of the "take affirmative action" clause to include a reimbursement order.

58. *See, e.g.*, Hoffman v. Federal Deposit Ins. Corp., 912 F.2d 1172, 1174 (9th Cir. 1990) (ordering a bank president to reimburse the bank for funds he received as a result of the bank buying out his employment contract when it appeared eminent that the bank would fail); First Nat'l Bank of Eden v. Department of Treasury, 568 F.2d 610, 611 (8th Cir. 1978) (requiring reimbursement for excessive bonuses paid to the bank's president and vice president).

59. The legislative history to 12 U.S.C. § 1818(b)(6) reveals Congress' efforts to clarify the regulatory agencies' authority. The legislative history provides, in pertinent part:

> This provision . . . overrules the 7th Circuit Court of Appeals decision in Larimore v. Comptroller of the Currency, 789 F.2d 1244 (1986), which held that C&D (cease and desist) authority of the banking agencies did not authorize the OCC to seek in a C&D order reimbursement from a director of a national bank,

§ 1818 to allow a regulatory agency to require a bank official to provide reimbursement if the party was unjustly enriched or if the violation involved a reckless disregard for the law.[60] The legislative history of this provision reveals an effort to clarify the regulatory agencies' authority.[61] Congress has expressed the necessity for regulatory agencies to seek reimbursement from bank directors who violate banking laws.

IV. Other States' Banking Statutes Analogous to Indiana and Federal Banking Statutes

In 1990, the Illinois Legislature used wording virtually identical to that of the current 12 U.S.C. § 1818 in writing the Illinois Savings Bank Act.[62] The Illinois statute only applies to savings banks; the Illinois Legislature has not adopted a similar statute for its commercial banks. It is readily apparent from the statute that the Illinois Banking Commissioner may require reimbursement in an order issued to a director of a savings bank when the director violates the bank's legal lending limit and a loss to the bank results. To date, no cases have arisen in which the Illinois Banking Commissioner sought reimbursement from a

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> who participated in violations of the national Banking Act. The Larimore case has caused confusion in the banking legal community, especially since the underlying conduct in that case did not involve unjust enrichment or harm to the institution. This section would allow such restitution, reimbursement, or indemnification for cases involving unjust enrichment or reckless disregard by the individual involved.

H.R. Rep. No. 54(I), 101st Cong. 1st Sess. at 291, 486 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 264.

60. A regulatory agency may require a director to "make restitution or provide reimbursement, indemnification, or guarantee against loss if . . . such depository institution or such party was unjustly enriched in connection with such violation or practice; or, the violation or practice involved a reckless disregard for the law or any applicable regulations." 12 U.S.C. § 1818(b)(6) (Supp. II 1990).

61. *See supra* note 59.

62. Ill. Ann. Stat. ch. 17, para. 7311-1 (Smith-Hurd Supp. 1991). The Illinois statute provides:

> The Commissioner is hereby granted authority to issue orders under this Act that requires a savings bank or an institution-affiliated party to take affirmative action to correct any conditions resulting from any violations . . . . The order may require . . . the institution-affiliated party to: (1) Make restitution or provide reimbursement, indemnification, or guarantees for or against losses if: (A) the savings bank or the institution affiliated party was unjustly enriched or received direct or indirect personal benefit in connection with the violation or practice; or (B) the violation or practice involved a reckless disregard for applicable laws, regulations, or written agreements or written orders of the Commissioner or other appropriate regulator.

Id.

director for losses resulting from loans made in excess of a bank's legal lending limit.

The Missouri Legislature amended its banking statute in 1990 to define the appropriate actions allowable under the "take affirmative action" clause.[63] The amendment is identical to the wording in the Illinois Savings Bank Act and the wording Congress adopted (under FIRREA) in amending 12 U.S.C. § 1818. It is apparent that the Missouri Legislature did not believe that Missouri's State Division of Finance had the appropriate authority to require reimbursement from directors under the previous statute absent the amended language.

The Kentucky Legislature adopted the pre-FIRREA language of 12 U.S.C. § 1818, which allows the Kentucky Department of Financial Institutions to require bank directors to "take affirmative action to correct conditions resulting from such violation or practice."[64] This Kentucky banking statute does not define the appropriate "affirmative action" that the Kentucky Department of Financial Institutions may require of banking directors. Another Kentucky banking statute allows for director liability for any loss resulting from a violation of a banking statute.[65] This second statute is somewhat analogous to 12 U.S.C. § 93, but it fails to specifically provide that the Kentucky Department of Financial Institutions can bring suit in its own name to require reimbursement from the directors. The statute only allows Kentucky's Department of Financial Institutions Commissioner to revoke the charter

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63. Mo. Ann. Stat. § 361.261 (Vernon Supp. 1991)(effective Apr. 30, 1990). The Missouri statute states:

> The authority to issue an order under section 361.260 which requires a corporation or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such corporation to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such corporation or such person to: (1) Make restitution or provide reimbursement, indemnification, or guarantee against loss if: (a) Such corporation or such person was unjustly enriched in connection with such violation or practice; or (b) The violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the director . . . .

Id.

64. Ky. Rev. Stat. Ann. § 287.690(3) (Michie/Bobbs-Merrill 1988).

65. *Id.* § 287.990(5). The statute provides:

> Any directors of a bank who knowingly violate, or knowingly permit any officer or employee [sic] of the bank to violate, any of the laws relating to banks, shall be jointly and severally liable to the creditors and stockholders for any loss resulting from such violation. If the loss or damage is not made good within a reasonable time, the commissioner, with the consent of the attorney general, shall institute proceedings to revoke the corporate powers of the bank.

Id.

of a bank whose directors refuse to comply with a reimbursement order.[66] To date, no cases have been reported in which the Kentucky Department of Financial Institutions sought reimbursement from directors for losses resulting from lending limit violations.

Ohio's banking laws have a provision analogous to Kentucky's in that a cease and desist order may require the bank directors to "take affirmative action to correct the conditions resulting from any such violation."[67] Ohio also has a statute providing for the personal liability of directors.[68] However, this statute does not explicitly indicate that the Ohio Banking Department may bring suit in its own name against directors who violate a banking statute which results in a loss to the bank before the bank is placed in receivership. Ohio's statutes create the same dilemma as Kentucky's in that the court will have to take an expansive view of the "take affirmative action" language, in light of the existence of another statute, in order to provide the Ohio Banking Department with an avenue for bringing a reimbursement action against a bank director.

Michigan law, as well as Ohio and Kentucky law, contains the "take affirmative action" clause with no definition of the extent of affirmative action that the Michigan Financial Institutions Bureau may request.[69]

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66. Indiana's statutes differ in that they grant the DFI authority to take possession of a bank that violates banking laws but the statutes do not specifically authorize such action for the failure of bank directors to make reimbursements to the bank as does the Kentucky banking statute. *See supra* note 30.

67. OHIO REV. CODE ANN. § 1125.08 (Anderson 1988). The Ohio law states:

> [T]he superintendent may issue and serve upon the bank or regulated individual an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank and its directors, officers, employees, and agents, or the regulated individual, to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

Id.

68. *Id.* § 1115.06. This statute provides:

> Any member of the board of directors of a bank who knowingly violates or knowingly permits any of the officers, agents, or employees of the bank to violate any of the provisions of Chapters . . . shall be liable in his personal and individual capacity for all damages which the bank, its shareholders, or any other person sustains in consequence of such violation.

Id.

69. MICH. COMP. LAWS ANN. § 487.335 (West 1987). The Michigan statute provides:

> [T]he commissioner may issue and serve upon the institution an order to cease and desist from any such practice or violation. By provisions which may be mandatory or otherwise, the order may require the institution and its directors, officers, employees and agents to cease and desist from the same and to take affirmative action to correct the conditions resulting from any such practice or violation.

Id.

Michigan also has a statute allowing for the personal liability of directors and provides that such suit may be brought by "any shareholder or any other person [who] sustains [damages] in consequence of the violation."[70] The Michigan Financial Institutions Bureau will have to claim that it suffered some damage in order to have standing to bring suit under this statute.

Illinois and Missouri have taken the lead in adopting the language of the federal statute defining the appropriate remedies allowed under the "take affirmative action" clause. Indiana, as well as Ohio, Kentucky, and Michigan, has not adopted a definition of what "affirmative action" is appropriate for banking regulators to require of bank directors. The intention of the Indiana General Assembly is unclear because it failed to follow Congress, as the Illinois Legislature did, in adopting the federal amendments to 12 U.S.C. § 1818. Various explanations for this lack of clarification may exist. An explanation may be that the Indiana lawmakers wished to confer on the Indiana Department of Financial Institutions (DFI) broad powers in carrying out its functions. This interpretation, giving bank regulators broad powers, has support at the federal level as seen in *del Junco v. Conover* and in Congress' actions of amending 12 U.S.C. § 1818 to specifically overrule the holding in *Larimore v. Comptroller of Currency*.[71]

V. Proposal for the Interpretation of Indiana's Banking Statutes that Will Provide the DFI with a Cause of Action

The failure of the Indiana General Assembly to adopt a definition for appropriate action that the DFI may request under the "take affirmative action" clause is confusing at best. Either the legislature thought that the DFI already had this authority or the legislature did not wish the DFI to be able to order reimbursement from directors. The legislature could have easily provided explicit language to indicate either of these options, yet the legislature chose to leave the "take affirmative action" clause undefined. Although "affirmative action" may include establishing

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70. *Id.* § 487.513. Personal liability is imposed by the following language:

> If the directors or officers of a bank knowingly violate, or knowingly permit any of the agents, officers or directors of a bank to violate, any of the provisions of this act or rules of the commissioner made under authority thereof, every director and officer who participated in or assented to the violation shall be held liable in his personal and individual capacity for all damages which the bank, any shareholder or any other person sustains in consequence of the violation. Any action to recover damages shall be brought within 3 years from the time of the violation, and not afterwards.

Id.

71. *See supra* notes 37-54 and accompanying text.

loan policies or increasing the level of capital, the language may also contemplate requiring directors to reimburse the bank for losses sustained as a result of lending limit violations.

Congress contemplated federal regulatory agencies seeking reimbursement orders and explicitly provided such authority in 12 U.S.C. § 93, and also in 12 U.S.C. § 1818. It is difficult to believe that the Indiana Legislature chose to preclude the DFI from having the authority to take similar action.

In 1991, when the legislature gave the DFI the power to assess civil monetary penalties, the legislature also gave the DFI the power to issue an order requiring a bank director to "take affirmative action to correct the conditions resulting from the practice or violation."[72] Because the legislature provided for the assessment of CMPs in the same statute that allows an order to require the directors to "take affirmative action," the legislature must have intended the "take affirmative action" clause to allow for reimbursement orders.

A comparison of the high limit of penalties that federal regulatory agencies may impose with the relatively low limit that the DFI may impose further indicates that the legislature did not wish to preclude reimbursement actions under the "take affirmative action" clause.[73]

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72. IND. CODE § 28-11-4-7(c)(1)(B) (West Supp. 1992). *See supra* note 24.

73. The federal statute allowing civil monetary penalties was amended by FIRREA and now reads as follows:

> (A) First tier. Any insured depository institution which, and any institution-affiliated party who-
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> (i) violates any law or regulation;
>
> (ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section;
>
> (iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or
>
> (iv) violates any written agreement between such depository institution any such agency,
>
> shall forfeit and pay a civil penalty of not more that $5,000.00 for each day during which such violation continues.
>
> (B) Second tier. Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who—
>
> (i)(I) commits any violation described in any clause of subparagraph (A); (II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or (III) breaches any fiduciary duty;
>
> (ii) which violation, practice, or breach—(I) is part of a pattern of misconduct; (II) causes or is likely to cause more than a minimal loss to such depository institution; or (III) results in pecuniary gain or other benefit to such party,
>
> shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.
>
> (C) Third tier. Notwithstanding subparagraphs (A) and (B), any insured depository

Federal regulators may impose penalties up to $1,000,000. If the purpose of the Indiana statute is to deter violations, the legislature should have followed Congress' lead and adopted a higher penalty limit. Regulators may assess penalties regardless of whether the violation has resulted in the bank losing money. The DFI should be given the option of either imposing penalties or seeking reimbursement, whichever remedy the DFI determines to be most effective to address the specific situation.

Because the DFI is given such an onerous task as ensuring the solvency of the state's financial institutions, a broad interpretation of the DFI's authority is warranted. The legislature may have specifically left the "take affirmative action" clause broad and ambiguous to allow the DFI to fashion an appropriate remedy in situations such as lending limit violations.[74]

The function of the DFI is to ensure the financial soundness of the bank. Therefore, waiting for the bank to fail in order for the DFI to bring suit against the directors is inconsistent with the DFI's function. The DFI should be able to take immediate action to mitigate the possibility of a bank failure. A bank may still be harmed even if the directors' actions do not result in jeopardizing the bank's viability. Consequently, the DFI, the only entity aside from the bank directors with possible knowledge of the violation, should be allowed to pursue a reimbursement order. Although the DFI may not suffer direct loss, the directors' violations of the applicable banking statutes impinge upon

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institution which, and any institution-affiliated party who—

(i) knowingly—(I) commits any violation described in any clause of subparagraph (A); (II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or (III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach, shall forfeit and pay a civil penalty in an amount not to exceed to applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (c). The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is— (in the case of any person other that an insured depository institution, an amount to not exceed $1,000,000. . . .

12 U.S.C. § 1818(i)(2) (Supp. II 1990).

74. *Cf.* Foremost Life Ins. v. Department of Ins., 409 N.E.2d 1092, 1096 (Ind. 1980) ("[A] statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used . . . ."); Thompson v. Thompson, 286 N.E.2d 657, 661 (Ind. 1972) ("The foremost object of construing a statute is to determine and carry out the true intent of the Legislature.").

the DFI's duties of protecting the financial institution and ensuring the public's confidence in the financial system.

The DFI and the Office of the Comptroller of the Currency (OCC), through regulation, attempt to ensure the soundness of the state and national banking systems respectively. Since 1864, the OCC has had the authority to seek reimbursement from directors.[75] The similarity of duties the OCC and the DFI perform in regulating banks reveals that the DFI should be allowed to seek reimbursement from directors when the bank sustains a loss on a loan made in excess of the bank's legal lending limit. The DFI must take action before losses to the bank become even greater.

The Seventh Circuit decided *Larimore v. Comptroller of Currency* in 1986, and Congress adopted FIRREA in 1989. Yet, when the Indiana General Assembly amended the Indiana banking statute in 1991, it did not provide explicit language to define the proper remedies under the "take affirmative action" clause. Portions of the Indiana banking statutes utilize virtually identical language as portions of the federal banking statutes that provide for the requirement of taking "affirmative action." Because of the conflicting interpretations in *del Junco* and *Larimore* of the "take affirmative action" clause,[76] the Indiana lawmakers should have provided some guidance on the appropriate remedies for the DFI to utilize. Indiana courts may find room to broaden the interpretation of the "take affirmative action" clause in the absence of any other statute allowing the DFI to seek reimbursement.

The division of the federal circuits in interpreting the "take affirmative action" clause and the Ninth Circuit's reaffirmation of its decision in *del Junco* after Congress amended the federal banking statutes in 1989 to overrule *Larimore*, supports the interpretation that the "take affirmative action" clause contemplates regulatory agencies seeking reimbursement in their administrative orders.

The Indiana statutes provide judicial review that 12 U.S.C § 1818 precludes, and about which the court in *Larimore* was concerned.[77] The procedural safeguard question does not arise because no other statute in Indiana allows the DFI to utilize greater procedural safeguards. The current Indiana statute, although analogous to the pre-FIRREA 12 U.S.C. § 1818, should allow the DFI to bring suit in its own name requesting reimbursement from directors who have violated the bank's legal lending limit.[78]

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75. 12 U.S.C. § 93(a) (1988).
76. *See supra* notes 37-54 and accompanying text.
77. IND. CODE § 28-11-4-8(c) (Supp. 1992).
78. If the legislature decides that the DFI should not be given the authority to

Banking is a regulated industry and allowing a regulatory agency, such as the DFI, the authority to sue bank directors in their individual capacity does not unduly increase the burden of regulation. National bank directors are already subject to such liability. The proposed cause of action for the DFI provides a remedy for any harm caused as a result of loans made in excess of the bank's legal lending limit. Personal liability only becomes an issue after a bank director violates a lending limit statute. Because bank directors may currently violate state banking laws and avoid the consequences of their actions, the DFI should be given the authority to sue directors in their personal capacity.

Bank directors have the duty to comply with applicable banking laws and should not escape liability if they breach this duty. The directors should be charged with correcting the condition resulting from the violation. The notion of director reimbursement is not a foreign concept because shareholders who have knowledge of such violation can sue directors to recover for any losses resulting from lending limit violations.[79]

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bring suit in its own name against directors who have violated the bank's legal lending limit, the legislature should at least consider amending the restrictions on the disclosure of examination material. Congress has realized that disclosure of administrative actions actually benefits compliance. Shareholders, creditors, and depositors will have adequate information to decide whether to seek a reimbursement suit against directors if regulators increase the public disclosure of examination information.

In § 913 of the FIRREA, Congress increased the public disclosure of final enforcement orders and provided the following explanation:

> The bank regulatory agencies, with infrequent exceptions, do not disclose civil enforcement actions. (They are the only Federal regulatory agencies which do not do so.) [sic] This policy and [sic] has been specifically criticized in congressional reports and during congressional hearings. One of the problems in the financial services industry (except for SEC-regulated institutions, which must disclose such enforcement actions) has been the excessive secrecy of agency supervisory actions. Such secrecy does little to deter misconduct, but does serve to ultimately worsen the problems of financial institutions. The October 1988 Government Operations Committee report specifically recommended legislation to require the banking agencies to publicly disclose all formal civil enforcement actions and any modifications to or terminations of such orders. Disclosure could be delayed only in those rare instances where it would imminently jeopardize the institution's solvency. The Committee strongly believes that more disclosure of formal enforcement orders will help prevent insider misconduct.

H.R. REP. No. 54(I), 101st Cong. 1st Sess. 291, 470 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 266. Annual reports may provide shareholders with some access to information regarding loan losses. However, losses resulting from loans made in excess of the lending limit most likely will not be separated in such a report to provide the shareholder with adequate information to bring suit. Absent any "red flag" to the shareholder, it may be difficult, if not impossible, to force disclosure of any losses occurring from loans made in excess of the bank's legal lending limit. Therefore, allowing the DFI to bring suit would be the most effective means of enforcement.

79. Because the DFI's function is to ensure the soundness of financial institutions,

VI. Conclusion

There is a void of case law concerning state banking departments bringing suit against directors personally for violations of banking statutes that result in losses to the bank but do not cause the insolvency of the bank. The parties who have greatest access to the violations and resulting losses, the regulators, are often unable by statute to disclose this information to stockholders and others who may then bring an action against the bank directors. Because banking departments are charged with ensuring the safety and soundness of financial institutions, they should have the authority to bring suit against directors requiring reimbursement before the condition of the bank deteriorates to a point of being placed in receivership.

In Indiana, the assessment of civil monetary penalties is too narrowly directed toward deterrence and does nothing about correcting the condition resulting from the violation of a banking statute.

The current language of Indiana's banking statutes may present difficulties if the DFI wishes to bring suit against bank directors and require reimbursement for losses resulting from violations of the bank's lending limit. However, the federal cases that have interpreted similar language have relied upon the existence of another statute that allowed the regulator another avenue to bring a reimbursement action. Absent a similar statute in Indiana, the courts may find that the legislature intended the DFI to bring reimbursement actions under the "take af-

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the DFI is essentially performing a function of the FDIC by protecting the FDIC insurance fund. The FDIC fund protects depositors; therefore, the DFI is indirectly protecting depositors. The DFI should be given whatever authority is necessary to ensure the soundness of each state banking institution because of the great interest in protecting depositors. Although protecting depositors, the DFI is indirectly protecting shareholders. Private investors in public corporations do not receive government protection. However, to ensure the stability of the banking system, it is necessary for the DFI to provide some protection for depositors. This protection is warranted even if it also benefits shareholders. Allowing reimbursement from directors provides the DFI with a means to alleviate the adverse effects of lending limit violations.

The matter of how far the state banking departments should go in protecting depositors who are already insured by the FDIC fund may be analogous to the question of how far the FDIC should go in protecting depositors who are uninsured (i.e., have in excess of $100,000 on deposit at a single financial institution).

In a statement by Robert Clarke, Comptroller of the Currency, before the Subcommittee on Economic Stabilization, House Committee on Banking, Finance and Urban Affairs, concerning deposit insurance of uninsured depositors, he stated: "Too little protection could threaten the stability of financial markets; too much protection raises serious questions about competitive equity, can reduce incentives for uninsured depositors to monitor the riskiness of institutions, and has the potential to strain the resources of the federal deposit insurer." *Speeches and Congressional Testimony*, 10 Q. J. No. 3 at 35 (1991).

firmative action'' statute. In any event, the Indiana General Assembly should take the lead of Congress, the Illinois Legislature, and the Missouri Legislature and amend the Indiana banking statutes to explicitly allow the DFI to bring a reimbursement action against directors before the bank is insolvent or placed in receivership.

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COMMENT

Fighting Racism: Hate Speech Detours*

THOMAS W. SIMON**

INTRODUCTION

A white male student shouts to a black woman student, "My parents own you people." Fliers are distributed declaring "open season on blacks" in which blacks are referred to as "saucer lips, porch monkeys, and jigaboos." White students spit on and taunt Asian-American students. A letter is addressed to a black student dormitory that discusses "wip[ing] all g.d. niggers off the face of the earth."[1]

More than 100 colleges and universities have enacted hate speech codes[2] in response to numerous racial and related incidents on college campuses. The National Institute Against Prejudice and Violence has documented a dramatic increase in ethnoviolence, affecting literally thousands of students on hundreds of campuses.[3] Universities have garnered

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* This Article contains material that the reader may find offensive.

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1. Kim W. Watterson, Note, *The Power of Words: The Power of Advocacy Challenging the Power of Hate Speech*, 52 PITT. L. REV. 955, 960 (1991).

2. Anthony DePalma, *Battling Bias: Campuses Face Speech Fight*, N.Y. TIMES, Feb. 20, 1991, at B9.

3. Howard Ehrlich, *Campus Ethnoviolence and the Policy Options*, 4 NAT'L INST. AGAINST PREJUDICE & VIOLENCE 41 (1990).

praise from some for taking a stand against racism, yet condemnation from others for intruding upon freedom of speech.[4]

This Article will argue that hate speech represents the wrong issue on which to concentrate. Legalistic and free speech nets trap the unwary, creating diversions from more important antiracism efforts. The nets come complete with untenable distinctions between crude and sophisticated hate speech and with other insuperable problems, such as distinguishing between protected and unprotected speech within a blurred field of categories.

Deflating the importance of hate speech regulation does not entail discounting the impact that hate speech has on its victims or minimizing the connection between hate speech and racism. The hate speech victim's injury and the perpetrator's attitude can better be dealt with by directly confronting the nonspeech manifestations of racism. If the effects of racism, i.e., institutional structures and practices, did not loom so large, the victim would have less about which to be sensitive. Therefore, instead of concentrating on ways to counter the deplorable incidents of hate speech, we should use the speech incidents to address the more fundamental problems of racism, or to challenge the structures underlying racism directly. Words can hurt, but the sticks and stones of racism harm in even greater ways.

Instead of taking free speech as the framework for rejecting hate speech regulation as many of the analyses do,[5] I take antiracism as the point within which to evaluate hate speech regulation. Defenders of free speech operate from noble principles, many of which I applaud, but they often operate from a perspective of pristine principles that ignore contextual complexity. An antiracism perspective puts forth an explicit political position fully immersed in political context.

From an antiracism perspective, hate speech regulation creates a detour. The first diversion, taken up in Part I, consists of the search for a legal pigeonhole for making hate speech an actionable offense. There is no consensus regarding the justification for hate speech regulation. A similar confusion, addressed in Part II, surrounds the attempts by universities to devise policy goals that undergird hate speech regulation. Ironically, universities have failed to adopt the most obvious policy goal, formulated in terms of antiracism. The diversionary nature of hate speech regulation begins to emerge more clearly when the difficulties of making a distinction between crude and sophisticated hate speech are spelled

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4. This Article will concentrate on racism, but the arguments are applicable to other forms of subjugation, such as sexism and homophobia.

5. *See, e.g.*, Carl Cohen, *Free Speech and Political Extremism: How Nasty Are We Free to Be?*, 7 L. & PHIL. 263 (1989); FRANKLYN HAIMAN, SPEECH AND LAW IN A FREE SOCIETY (1981).

out in Part III. In this section, I will also explain how these difficulties make up part of a larger problem of drawing a boundary between protected and unprotected speech. As will be illustrated, the boundary problem reaches a point of absurdity when it becomes apparent that even talking about hate speech proves problematic. Recommendations for replacing the free speech approach to fighting racism are set forth in Part IV. As I will explain in Part V, the expressions of racism can best be dealt with by making them part of the factors that heighten the punishment for already existing crimes.

I. The Search for a Legal Pigeonhole

The various legal pigeonholes within which regulators have attempted to restrict hate speech include: free speech-fighting words,[6] hostile work environment,[7] group libel,[8] tort,[9] and international human rights (the

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6. In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), the Supreme Court first articulated the fighting words test and refused to give First Amendment protection to words that were likely to provoke violent responses. Chaplinsky said the following to a law enforcement officer: "You are a God damn racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." *Id.* at 569. In Cohen v. California, 403 U.S. 15 (1971), the Court refused to extend the fighting words doctrine to an inscription on the back of a jacket that was not intentionally directed at any specific individual or individuals. The fighting words approach to hate speech is embodied in a number of university codes, including the University of Connecticut, University of Conn. Student Handbook 61 (1990-91); The University of Wisconsin, Wis. Admin. Code § 17.06 (Aug. 1989); and Stanford University, Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment (1990). For a defense of the fighting words approach to hate speech, see Charles R. Lawrence III, *If He Hollers let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431.

7. In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court ratified the common law extension of Title VII's prohibitions against quid pro quo sexual harassment to a hostile work environment. A number of universities have adopted the hostile work environment approach to hate speech. *See, e.g.*, Emory Univ., Campus Life 112 (1990-91); Kent State Univ., University Life, Digest of Rules and Regulations 12-13 (1988); University of N.C. at Chapel Hill, The Instrument of Student Judicial Governance 5-7 (1991). To prove that a hostile work environment exists, the complainant must show a series of repeated incidents, not simply a single event.

8. In Beauharnais v. Illinois, 343 U.S. 250 (1952), the Supreme Court adopted a group libel analysis. However, many claim that *Beauharnais* is no longer good law. Nevertheless, a number of commentators have attempted to revive the group libel approach. *See, e.g.*, Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 Sup. Ct. Rev. 281 (advocating a group libel approach); David Kretzmer, *Freedom of Speech and Racism*, 8 Cardozo L. Rev. 445 (1987); Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 Colum. Hum. Rts. L. Rev. 11 (1985); Kenneth Lasson, *In Defense of Group-Libel Laws or Why the First Amendment Should Not Protect Nazis*, N.Y. L. Sch. Hum. Rts. Ann., Spring

International Convention on the Elimination of All Forms of Racial Discrimination).[10]

The analysis of this Article is confined to those regulatory attempts that counter hate speech within the context of free speech. The reasons for placing an emphasis on the speech aspects of hate speech are both obvious and subtle. By its very nature, hate speech is about speech. Yet, on a more subtle level, the speech component of hate speech places the issue within a set of categories that doom hate speech regulation as a relatively ineffective means of combatting racism. While the other legal categories listed above differ markedly in their analyses, all focus on the speech element. Working within the confines of speech actually serves to divert opponents of racism from more important issues. As discussed below, a key indicator that hate speech regulation diverges from a policy of antiracism is found in the policy goals articulated by various universities.

II. University Goals

Although universities differ as to the type of regulations adopted to regulate hate speech, the following serves as a fairly typical example:

> Arizona State University ("A.S.U." or "the University") is committed to maintaining hospitable educational, residential, and working environments that permit students and employees to pursue their goals without substantial interference from harassment. Additionally, diversity of views, cultures, and experiences is critical to the academic mission of higher education. Such diversity enriches the intellectual lives of all, and it increases the capacity of a university to serve the educational needs of its community.
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> A.S.U. is also strongly committed to academic freedom and free speech. Respect for these rights requires that it tolerate

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1985, at 2798; David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 Colum. L. Rev. 727 (1942); Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682 (1988). The University of Kansas has adopted a group libel approach to hate speech. University of Kansas Student Handbook 28 (1990-91).

9. Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982) (proposing a tort cause of action against racial hate speech). The University of Texas has modeled part of its hate speech code on the common law tort of intentional infliction of emotional distress. University of Tex., General Information, Institution Rules of Student Services and Activities 174, App. C (1990-91).

10. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

> expressions of opinions that differ from its own or that it may find abhorrent.
>
> These values of free expression justify protection of speech that is critical of diversity and other principles central to the University's academic mission. However, values of free expression are not supported, but are undermined by acts of intolerance that suppress alternative views through intimidation or injury. Institutions of higher education must stand against any assault upon the dignity and value of any individual through harassment that substantially interferes with his or her educational opportunities, peaceful enjoyment of residence, physical security, or terms or conditions of employment.[11]

This policy statement typifies those of universities that have drafted regulations concerning hate speech. Such statements contain the following, sometimes conflicting, policy goals: maintaining civility and decorum, instilling citizenship and virtue in students,[12] protecting students from harm,[13] fostering diversity, protecting academic freedom, and protecting freedom of speech. The perspectives on hate speech codes differ with respect to the position taken on the last two policy goals.

The positions on the hate speech issue divide roughly according to which policies are adopted. Those advocating a strong form of regulation accept the first four policy goals (civility, virtue, protection, and citizenship). Those proposing a weaker form of regulation accept the same four policy goals and add the academic freedom goal. This weaker form of regulation lessens the scope of the regulations because it makes the classroom immune from regulation by what the advocates of strong regulation would believe qualifies as hate speech. Those favoring a weaker set of regulations draw a sharp distinction between crude hate speech and sophisticated hate speech, the latter of which would avoid regulation because of adherence to the academic freedom policy goal. Those opposed

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11. Policy Statement Supporting Diversity and Free Speech at Arizona State University, at 1.

12. Professor Suzanna Sherry has collected some illustrations of hate speech regulations that invoke a virtue rationale, as, for example, the Ohio State preamble, which states that "acceptance, appreciation of diversity, and respect for the rights of others must be institutional values for a major public university and are values that it must impart to its students and to society as a whole." Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 940 (1991).

13. Protecting students from harm is the doctrine underlying in loco parentis. *See, e.g.*, MICHAEL A. OLIVAS, LAW AND HIGHER EDUCATION, 599-615 (1989). For an analysis that extends the protective function to the hate speech context see Charles H. Jones, *Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383, 1418 (1991).

to regulation of hate speech base most of their arguments on a strong commitment to freedom of speech. Whatever virtue these antiregulators might see in the other policy goals, they find them insufficient to justify restrictions on hate speech, in whatever variety.

Notice that I have not invoked any policies that manifest a university's commitment to the eradication of racism, sexism, ethnocentricism, and homophobia.[14] This helps to illustrate the tenuous link between hate speech codes and antiracism. When universities provide a rationale for a hate speech code, they omit any reference to antiracism.

An explicit formulation of an antiracism policy might be:

> "Eradication of group subjugation in the form of racism, sexism, ethnocentrism, and homophobia."

Generally, universities do not articulate their policy goals in bold form.[15] Public universities avoid policies such as this one because proclaiming the outright condemnation of subjugation makes a political commitment favoring certain groups, thereby violating the university's claims to neutrality. However, wholesale condemnation is exactly what universities should proclaim, even if it violates some sense of neutrality. Universities need to develop an overall plan of action to combat subjugation; hate speech regulation may or may not be part of that overall plan. In fact, a university could consistently adopt an effective antiracism policy and implement it without any hate speech code. In any case, hate speech regulation would play, at best, a minor role instead of occupying its current position at center stage.

Universities that declare a strong antiracism policy are on firmer ground than are those who advocate either strong or weak regulation of hate speech. No matter what their cast, regulators find themselves entangled in a legalistic, free speech web that poses insuperable problems. Weak regulators need to draw a questionable distinction between crude and sophisticated hate speech. The strong regulators open the door to academic censorship. All advocates of hate speech regulation find themselves mired in the problem of where to draw the line between protected and unprotected speech. These problems do not simply serve as a challenge for the regulators to become more sophisticated in mapping out

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14. For the sake of brevity I shall incorporate sexism, homophobia, and ethnocentricism under the rubric of racism.

15. An exception is provided by the Board of Regents of Higher Education of the Commonwealth of Massachusetts: "Racism in any form, expressed or implied, intentional or inadvertent, individual or institutional, constitute an egregious offense to the tenets of human dignity and to the accords of civility guaranteed by law." BOARD OF REGENTS OF HIGHER EDUC., COMMONWEALTH OF MASS., POLICY AGAINST RACISM AND GUIDELINES FOR CAMPUS POLICIES AGAINST RACISM 1 (June 13, 1989).

their positions. They forcefully demonstrate the need to abandon regulation and give priority to positive programs that begin to address the serious problems of subjugation facing colleges, and society at large. Universities ought to take the lead in fighting racism. Let us turn to an examination of these problems.

III. The Boundary Problem

A. Crude Versus Sophisticated Hate Speech

Crude hate speech, according to some proponents of hate speech regulation, consists chiefly of racial or ethnic slurs and vulgar epithets that are on their face offensive to those at whom they are directed. Sophisticated hate speech may consist of words that appear to merely state a fact but are, in fact, disparaging of a racial, ethnic, or other target group. An example of sophisticated hate speech would be as follows: "Black children in the United States have a mean intelligence quotient (IQ) score of about eighty-five, as compared with one hundred for the white population, on which the test was standardized."[16]

The context of hate speech can change a supposedly simple factual statement into a controversial one. Assume that a claim about low IQs among blacks is made in the context of a lecture designed to demonstrate the inheritability of IQ. In the course of the lecture, the lecturer might say nothing about the intellectual inferiority of blacks,[17] yet the inference hangs in the air.

The added contextual features make this a prime example of what Professor Mari J. Matsuda has called the case of the "Dead-Wrong Social Scientist."[18] According to Matsuda's analysis, this represents a sophisticated version of hate speech that, while admittedly offensive, should not be subject to prohibition because it does not have the following characteristics of crude hate speech: a persecutorial, hateful, and degrading message of racial inferiority directed against a historically oppressed group.[19] Accordingly, universities should not foster racial slurs

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16. Stephen Rose et al., Not in Our Genes: Biology, Ideology, and Human Nature 118 (1984). I purposefully cite a critique of the race/IQ debate by authors who clearly reject the project of imputing IQ scores on the basis of race to highlight an instance of "mention" as opposed to "use." *See infra* discussion Part V. *See also* Jensen, *How Much Can We Boost IQ and Scholastic Achievements?*, 5 Harv. Educ. Rev. 1 (1969). *Cf.* Stephen J. Gould, The Mismeasure of Man (1981).

17. I have decided, with some reluctance, to use the term "black" throughout the paper instead of "African-American" in order to more sharply contrast the term with "white." Many writers, including African-Americans, have adopted the same convention.

18. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2364 (1989).

19. *Id.* at 2365.

and epithets, but they should encourage debate over controversial academic positions, even if those positions support, however indirectly, racism.

Despite Matsuda's claims, sophisticated hate speech such as the IQ claim are actually within the sphere of hate speech regulation that Matsuda promotes because theories linking race and IQ possess the elements of crude hate speech. First of all, in order to place the IQ statement in the unregulateable sophisticated hate speech category, Matsuda has to assume that the "dead-wrong social science theory of inferiority is free of any message of hatred and persecution."[20] This assumption cannot be made so easily. The scientific status of a claim does not thereby free it from the charge of perpetuating hate and persecution. Scientists do not need to ascribe racial inferiority directly. The victims and others will draw the inference of inferiority without the need for anyone to say it directly. Although the IQ message does not necessarily deny the personhood of target group members, it does degrade by association—not by statistical association because a group member may be above the average[21]—but rather by psychological association.

Secondly, while the degrading aspects of the message may be more subtle in the scientific case than those of crude speech, sophisticated speech can have a persecutorial and hateful intent once it is fully analyzed. The speaker's intent is not as easy to analyze as the distinction between crude and sophisticated hate speech might suggest. It seems that crude hate speech clearly stems from racial animosity and that sophisticated hate speech may not—at least not without considerable more analysis.[22] However, the intent of crude hate speakers is often more complicated than it seems on the surface. Take an incident at Stanford University in which a white student, identified as "Fred," defaced a poster of Beethoven to represent a black stereotype and placed it outside the room of a black student. Fred, a German Jew, could not understand why blacks did not react the same way to what he considered "teasing" as he did to the incidents of antisemitism that ran rampant in his English boarding school.[23] This information about Fred at least raises questions as to whether or not Fred's symbolic speech stemmed from racial animosity. Although I cannot do justice to the debate over the relationship

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20. *Id.*

21. I owe this point to Professor Robert Simon, Department of Philosophy, Hamilton College.

22. I owe the formulation of this position to Professor Jorge Garcia, Department of Philosophy, State University of New York—Buffalo.

23. PATRICIA J. WILLIAMS, ALCHEMY OF RACE AND RIGHTS 111 (Harvard Univ. Press 1991).

between race and IQ, the intent underlying the sophisticated hate speaker seems just as complicated as those of crude hate speakers such as Fred. When fully analyzed, more racial animosity may underlie the seemingly innocent scientific pronouncements than meets the eye.[24]

Finally, historically, so-called scientific theories of racial inferiority have served as powerful mechanisms of subjugation. The harms to group interests flowing from scientifically supported institutional forms of racism are of a far greater magnitude than the individual hurt feelings associated with incidents of racial slurs.[25] Although, theoretically, both crude and sophisticated forms of hate speech can be confronted simultaneously, a focus on the crude dimensions of hate speech may well divert political energy away from the difficult task of ferreting out the more subtle forms of sophisticated hate speech.

Those attempting to distinguish between crude and sophisticated speech resort to another argument. Face-to-face racial insults do not deserve First Amendment protection because the injury from being called a terribly offensive, vulgar name is instantaneous, allowing no time for dialogue and rational deliberation.[26] These are often referred to as "fighting words," which fall outside the range of constitutional protection.[27] In fact, the offensive level of slurs and epithets reaches such heights that it would be inappropriate to respond verbally to this type of abuse. Rational deliberation seems neither possible nor appropriate in the midst of crude hate speech.

However, crude speech does not neatly fall outside the gambit of rational discourse while sophisticated speech fits comfortably within the realm of debate and argumentation. Crude speech is not immune from rational deliberation. Even in the heat of a crude speech incident, rational dialogue could emerge, however unlikely that may be. More plausible is a situation in which the crude speech incident becomes a stimulus for

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24. To take one example, it now appears that Sir Cyril Burt, who promoted the hereditary nature of IQ, harbored an animosity towards the poor that affected his work. Burt once wrote in a notebook: "The problem of the very poor-chronic poverty: Little prospect of the solution of the problem without the forcible detention of the wreckage of society or others preventing them from propagating their species." ROSE ET AL., *supra* note 16, at 87. Those asserting a link between race and IQ depended a great deal on Burt's data, which later turned out to be fraudulent.

25. For a discussion of different kinds of harms, see JOEL FEINBERG, HARM TO OTHERS 33-36 (Oxford Univ. Press 1984) (1926). Kretzmer narrowly confines himself to the kind of harm likely to stir up a racial group. This leads him to allow research findings showing a lower IQ for racial minorities. *See* Kretzmer, *supra* note 8, at 500. Far greater harms than audience reaction are at stake with scientific findings.

26. Lawrence III, *supra* note 6, at 452.

27. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cohen v. California, 403 U.S. 15 (1971).

later dialogue. The University of Michigan enforcement model, for example, included a provision for informal mediation before initiation of formal procedures.[28] Therefore, the crude hate speech incident could serve as an opportunity to open dialogue over abusive speech.[29]

Alternatively, sophisticated hate speech does not always leave room for informed rational debate between its proponents and representatives of vulnerable groups.[30] A presentation demonstrating the inverse relation between racial characteristics and intelligence given by an instructor in the classroom may leave little room for challenge, particularly from racial minority students. Students find themselves in a deferential power relationship with their professors. For example, according to one report, "at the University of Washington, a professor called in campus police to bar a student from class who had questioned her assertion that lesbians make the best parents."[31] Situations like these do not lend themselves to rational and open dialogue. In contrast, crude hate speech may lead to helpful debate. For example, students at Arizona State University reacted to a racist flier, containing crude speech, by organizing open discussions where they could educate others about the hurt resulting from the speech.[32]

One further problem with the distinction between crude and sophisticated hate speech deserves attention. Some perpetrators of crude speech simply may not have yet learned the sophisticated, polite, academic, indirect, but far more effective means of subjugation and subordination.[33] The crude yell epithets and racial slurs; the sophisticated

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28. Doe v. University of Mich., 721 F. Supp. 852, 866 (E.D. Mich. 1989).

29. Alan E. Brownstein, *Hate Speech at Public Universities: The Search for an Enforcement Model*, 37 WAYNE L. REV. 1451 (1991) (proposing an informal education as opposed to a formal enforcement model of hate speech regulation).

30. *See* Henry W. Saad, *The Case for Prohibition of Racial Epithets in the University Classroom*, 37 WAYNE L. REV. 1351, 1357 (1991) ("[A] minority who is the object of racial, sexual or ethnocentric epithets in the park may leave or engage in verbal combat. In the classroom, however, a student is victimized by racial or ethnocentric invective should not be forced to resort to such activity."). Mr. Saad represented the University of Michigan in Doe v. University of Michigan.

31. Henry J. Hyde & George M. Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 WAYNE L. REV. 1469, 1472 (1991).

32. Nat Hentoff, *The Right Thing at ASU*, WASH. POST, June 25, 1991, at A19.

33. When the *California Lawyer* magazine recently ran an article on gay lawyers, it received the following "sophisticated" letter from an attorney:

> Nothing today is more striking in our culture than the sexual mania of the Jews who edit, write and read current publications. Our legal magazine presents a good insight into the Jewish psyche-greed for money, inveterate vulgarity, complete disregard of non-Oriental norms of decency and an insatiable itch for all the uglier aspects of sex. I believe that the progressive deterioration of

bemoan diversity and collect data to show how blacks manifest their inferiority through intelligence tests or through being immersed in a culture of poverty.

Some of the cruder forms of hate speech, as a well-publicized case at Brown University illustrates, come from the mouths and pens of sophomoric college students in varying states of intoxication.[34] Although I am not minimizing the hurt that can stem from these incidents, it would be foolish to view these incidents as being at the forefront of racism. One cannot help but wonder whether the crude/sophisticated distinction depends upon the differential power and status positions of students and professors.

The arguments marshalled so far against the distinction between crude and sophisticated hate speech have not succeeded in showing that the distinction is impossible to maintain. They do show the inadequacy of the lines drawn so far. The distinction forces the advocate of weak regulation to make unpleasant choices between types of speech. The problem described in this Section is part of a larger problem within the hate speech issue, namely, drawing the boundary lines.

B. Other Boundary Problems

Basically, the regulators of hate speech must face the problem of what speech to include under their restrictions and what speech to exclude. The regulations have the following problems:

1. Too Narrow.—With respect to those regulations now in place, many regulations actually cover only a small range of activities. Stanford University's hate speech regulation states:

> 4. Speech or other expression constitutes harassment by personal vilification if it:
>
> a). is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> b). is addressed directly to the individual or individuals whom it insults or stigmatizes; and

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morality can be directly attributable to the growing predominance of Jews in our national life.

David Margolick, *At The Bar*, N.Y. TIMES, Oct. 9, 1992, at D16.

34. Brown University expelled undergraduate student Douglas Hann for an incident involving racial epithets and alcohol abuse. *Student at Brown Is Expelled Under a Rule Barring 'Hate Speech,'* N.Y. TIMES, Feb. 12, 1991, at A17.

c). makes use of insulting or "fighting" words or non-verbal symbols.[35]

Thus, under the "fighting" words model, the speech must be targeted directly against and at specific individuals or an individual, and it must be intentional. Crude, direct (individually targeted), intentional speech covers few instances. In fact, the very incident (in which a white student left on a black student's door a poster of Beethoven drawn as a black caricature)[36] that served as a stimulus to the construction of the hate speech code at Stanford would not be covered by Stanford's regulations. Fred, the white student, did not address his expression directly at the black student, identified as "Q.C.," and the Stanford disciplinary board did not find any injury to Q.C. Yet, the incident provoked the ire of blacks and others on the campus.

2. Too Broad.—Regulations can sweep far too broadly, applying to seemingly innocuous jokes, innuendoes, and derogatory remarks.[37] A hate speech regulation can chill speech far beyond the speech exemplified in the paradigm cases, thereby blocking ways to deal with the problem. Many times prejudicial attitudes can only be brought out into the open for examination if they find expression through various speech mechanisms. Stifling the relatively more innocuous expressions of prejudice in the form of jokes may actually stimulate the manifestation of hatred in more pernicious forms.[38]

3. Hate Speech Within and Between Protected Groups.—The classical case of crude hate speech occurs when a white male student addresses a black student in a derogatory manner. However, as the following examples illustrate, instances of hate speech do not always fall into the classical mode:

(1) A black male graduate student in social work stated, "Homosexuality is a disease."[39]

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35. Thomas C. Grey, *Civil Rights Versus Civil Liberties: The Case of Discriminatory Verbal Harassment,* 8 Soc. Phil. & Pol'y 106-07 (1991) (citing Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment (1990)).

36. *See supra* notes 22-24 and accompanying text.

37. The University of Michigan Office of Affirmative Action issued a set of later withdrawn guidelines on actionable hate speech that included: "You tell jokes about gay men and lesbians. You laugh at a joke about someone in your class who stutters." *See* Doe v. University of Michigan, 721 F. Supp. 852, 858 (E.D. Mich. 1989).

38. The University of Michigan Office of Affirmative Action Guideline gave the following as an example of blatant racial harassment: "A male student makes remarks in class like 'Women just aren't as good in this field as men' thus creating a hostile learning atmosphere for female students." *Id.*

39. *Id.* at 865.

(2) A dental student in a course taught by a minority female professor accused the teacher of being unfair to minorities; the teacher charged that the remark jeopardized her tenure.[40]

Perhaps these cases can be handled by treating the perpetrator's group affiliation as irrelevant to the determination of whether the instances qualify as actionable hate speech. Membership in a protected class should not make someone immune from regulation. However, the examples demonstrate the types of entanglements within which weak regulators find themselves—protected groups pointing fingers at other protected groups. The examples also help to point out that speech regulation does not constitute a very strong way to fight racism, because it may result in imposing more punishment than necessary. In fact, protected groups may feel a disproportionate impact from the regulations.

4. Nonparadigmatic Cases.—Many candidates for hate speech regulation do not fit the paradigm of clearly offensive or vulgar epithets. Consider the following example: "I'd had too much experience that women were only tricky, deceitful, untrustworthy flesh."[41] The derogatory element in this statement, attributed to Malcolm X, may not be as blatant as the paradigmatic case, but some women consider it just as loathsome.[42] Regulators need to consider whether regulations should extend beyond direct epithets.

Furthermore, an offensive derogatory comment may be directed at a dominant or majority group by a disadvantaged or minority group. Such an incident occurred at the University of Connecticut when "a student was ordered to move off campus and forbidden to enter university dormitories for putting a sign on her dorm room listing preppies, bimbos, men without chest hair, and homos as people who should be shot at sight."[43]

5. Already Proscribed.—Finally, does prohibiting hate speech cover anything more than current laws prohibit? Most incidents of hate speech complaints occur in conjunction with other violations. At the University of Wisconsin, all serious cases, i.e., those resulting in probation or suspension, involved some other violation of the student code of conduct, such as assault, whereas all charges involving only the use of racial epithets were resolved informally.[44] This indicates that serious incidents

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40. *Id.* at 866.

41. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X 226 (Ballatine Books 1992).

42. Members of protected groups should not be exempt from criticism or punishment when they themselves engage in hate speech polemics. Blacks are just as capable of making sexist, anti-Semitic, and homophobic remarks as are white males. I owe this clarification to Professor Michael Gorr, Department of Philosophy, Illinois State University.

43. Hyde & Fishman, *supra* note 31, at 1487.

44. Patricia Hodulik, *Racist Speech on Campus*, 37 WAYNE L. REV. 1433, 1441-45 (1991).

of racism are already actionable and that hate speech is best handled through informal mechanisms.

The boundary problem, as exemplified by the problems discussed above, may pose nothing more than a challenge to make the delineations more precise. Regulators need to meet these challenges in order to provide an adequate theory of hate speech. I doubt that regulators can devise a theory strong enough to overcome the various aspects of the boundary problem. To put these doubts in a more concrete form consider the following case study.

C. An Illustrative Interlude

In a public presentation of this paper, I peppered the analysis with many illustrations of hate speech, some of which I mentioned in the opening of this written version. The first response from the audience came from a woman who asked why I had used the examples. Anticipating her concern, I invoked the distinction, taken from some sophisticated literature in the philosophy of language, between *using* a word and *mentioning* a word. Mentioning a word, i.e., talking about a word, is not the same thing as actually using a word. "Alas," I implored, "I only *mentioned* but did not *use* hate speech. Mentioning "number" in the metalanguage about arithmetic has a far different character than using number in the object language. Similarly, I merely mentioned hate speech for illustrative purposes and did not use it."[45] Hardly satisfied with my intellectual maneuvering, she replied that she could not hear any of my substantive claims because she was so offended by my *use* of hate speech. Before I could muster a more informed reply, a fellow panelist, representing the antiregulation position, jumped to my defense, assuring the audience that although he would not have had the audacity to do what I had done, he defended my right to do so.

The incident dramatically raises three important issues, which I explore in the following subpart of this Section. The first two issues seem to support the regulation position, but they actually undermine the case for regulation, confirming the third problem, the monopoly of the free speech perspective.

1. Hidden Sophisticated Hate Speech.—First of all, my invocation of the distinction between using and mentioning a word did utilize the very same crude/sophisticated hate speech distinction that I had, then, and have, in this Article, attacked. *Mentioning* examples of hate speech may help to legitimate hate speech. It may produce offense no different

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45. For a defense of the use/mention distinction in the context of the hate speech debate, see Peter Linzer, *A White Liberal Looks at Racist Speech*, 15 ST. JOHN'S L. REV. 187, 213-19 (1991).

from unsophisticated *use* of hate speech. The victims could be just as offended and harmed by the persistent *mention* of hate speech as by the occasional blurting out of crude hate speech.[46]

Professor Patricia Williams cites the following example of the sophisticated mentioning of hate speech: "[A] constitutional-law exam in which students are given the lengthy text of a hate-filled polemic entitled 'How To Be a Jew-Nigger' and then told to use the First Amendment to defend it."[47] Williams finds this and other examples "highly inappropriate" in the sense that the writers "use race, gender, and violence in ways that have no educational purpose, that are gratuitous and voyeuristic, and that simultaneously perpetuate inaccurate and harmful stereotypes as 'truthful.' "[48] Even *mentioning* hate speech can therefore result in harm.[49]

Nevertheless, while the charges brought against even the mere mention of hate speech do have some validity, they do not justify more sanctions and more regulations. Rather, the charges lead to an impasse; talk about hate speech becomes difficult if not impossible when no one can talk about hate speech.[50] In a sense, the analysis of hate speech has become too sophisticated, clouding over the more primary goal of fighting racism in its more pernicious forms.

2. Social Meaning.—A second issue concerns who determines the meaning of an alleged incidence of hate speech. I am not the one to determine what offends and harms in these cases. Regulators and antiregulators alike (at least, those who do not come from the protected classes) assume, incorrectly, that they can determine harm in these instances. The victims, and not their self-proclaimed advocates, of hate speech need to determine the social meanings. Those in the dominant groups must respect the victims' determination. Victims determine social meanings in these contexts.

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46. "[A] case can be made that a lecturer on crime statistics who mentions that some ethnic groups have a higher crime rate than others, uses insulting language." Kretzmer, *supra* note 8, at 489.

47. WILLIAMS, *supra* note 23, at 84.

48. *Id.* at 85.

49. It is worth noting how certain kinds of *mentioning* have become more acceptable than others. Writers and editors of journal articles leave some examples of hate speech intact, whereas they almost always leave it to the reader's imagination to fill in the blanks for obscene language with examples such as "F____ you." Swearing and cursing have more editorial sanctions lodged against them than do racial epithets. The editors excised a number of examples of crude hate speech from this Article.

50. Sanctioning the mentioning of hate speech could result in muffling those who propose hate speech regulation because they do it by citing hate speech. Charles Lawrence begins his Article advocating hate speech regulation with a long list of examples of hate speech. *See* Lawrence, *supra* note 6. Patricia Williams makes the following comment: "[A] prostitute becomes seen only as a 'cunt'." WILLIAMS, *supra* note 23, at 185.

Those of us who do not belong to the typical victim classes should listen to those harmed by hate speech, and we should take preventive measures to protect the victims. For word and deed often go together, arm and fist, making up the complex array of racism, sexism, and homophobia. Allowing racist speech to go unchallenged may well create an opening for racism to take hold in its more vicious forms.

The protections against hate speech are not symmetrical, applying equally to whites and blacks, to men and women, to straights and gays. I challenge you to hurl hate speech my way, for "my way" includes the well-paved, sanitized roads of white, heterosexual, male privilege. The protections must encompass the vulnerable. What is needed is an understanding of who makes up the vulnerable classes.[51] We must walk a tightrope on which we both praise and condemn our differences. We must encourage criticism that pushes the bounds of tolerance without sacrificing our understanding of each other and ourselves.

Above all, we must find the courage to face the despicable hatreds that envelop our everyday lives and that thrive within each of us. The true color-blind, gender-neutral test lies in whether we can face ourselves in the mirror and confess our deep-seated bigotry, irrespective of our own race, gender, etc.[52] Only then can we fully dismantle the structures that allow oppression and subordination to fester and thrive.

Finally, we must appreciate that words have a tremendous power. Hate speech regulators have a powerful argument when they point to past mistakes. Antisemitic defamation flourished for decades before the Nazi rise to power, thereby providing a supportive cultural background for the "Final Solution."[53]

However, although the power of words and the racist aspects of hate speech should not be underestimated, neither should they be overestimated. Speech, rightfully determined by the victims as hateful and harmful, remains speech. It deserves condemnation in no uncertain terms, but it does not qualify for formal sanctioning. No one should deny the individual and group harm that comes from racial epithets. Yet, if victims determine social meaning, then the boundary problem arises once again because many groups can legitimately make an actionable claim. For example, religious fundamentalists could reasonably object to degrading remarks about those believing in God and homophobia.

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51. For an attempt to spell out a constitutional theory of disadvantaged groups, see Thomas W. Simon, *Suspect Class Democracy*, 45 U. MIAMI L. REV. 107 (1990).

52. A recent survey found that two-thirds of white students at the University of Maryland were almost totally oblivious to racial incidents that eighty percent of Afro-Americans vividly recalled.

53. Charles H. Jones, *Equality, Dignity and Harm: The Constitutionality of Regulating American Campus Ethnoviolence*, 37 WAYNE L. REV. 1383, 1423-24, n.156.

Moreover, if victims determine social meaning, then regulators need to step aside. Victims rarely constitute even a majority of the regulator class. Victims need to become the regulators. Otherwise, regulators would be guilty of paternalism, determining the potential harm inflicted upon victims from their own, nonvictim perspective. Placing potential victims in policy-making roles has its virtues, but it also replaces one boundary problem with another. Who chooses the potential victims and on what grounds? Without an explicit commitment to antiracism, universities face many difficulties in providing answers to those questions.

3. The Free Speech Takeover.—Even if a group justifiably finds sophisticated, and, of course, crude hate speech offensive and harmful, it does not necessarily follow that the speech should be banned. After all, at some point the incidents of hate speech need to be reported in order to be evaluated. Attacking sophisticated speech that mentions hate speech not only stymies the ability to bring the speech to public view,[54] it imposes First Amendment discourse upon what is really a racism issue. The important issue at stake is racism and not free speech. At some points, antiracism and free speech concerns dovetail; the voices condemning racism need First Amendment protection.[55] Nevertheless, giving free speech the center stage imposes grave risks. The danger with First Amendment discourse is that it can swamp many other equally, if not more, important concerns. A law school, for example, may do all it can to halt the proliferation of hate speech incidents while at the same time making little or no attack on the structural features of racism by refusing, for example, to establish clinic programs that primarily serve poor urban blacks, or by refusing to fund adequately loan forgiveness programs that provide students with an incentive to seek public interest employment.[56]

In short, the cynic sees, with some justification, hate speech as a speech issue having all the makings of an academic issue, in the double sense of "academic." Academic issues thrive when they stay largely at the level of words, and academics love to argue over words. The fight takes place over words while the structures continue to subjugate and

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54. "Racist speech can be used as a 'social thermometer' that allows us to 'register the presence of disease within the body politic.'" Hyde & Fishman, *supra* note 31, at 1489.

55. Richard Delgado, in an address to the State Historical Society in Madison, Wisconsin, captured the effect of permitting low-level racism to persist when he stated: "It prevents us from digging in too strongly, starting to think we could really belong here. It makes us a little introspective, a little unsure of ourselves; at the right low-grade level it prevents us from organizing on behalf of more important things." *See* Lawrence, *supra* note 6, at 476.

56. The University of Michigan may have been guilty of enacting a hate speech code for almost solely symbolic reasons. *Id.* at 477 n.161.

subordinate unabated. Controversial issues such as hate speech arouse the passions, but, like so many academic issues, the action taken on them has little practical or political impact.

Take another aspect of the cynic's view of the hate speech controversy. The hate speech issue fits a model of ideological impotency as well as academic inaction. Having lost a major war but also having won modest victories against racism and sexism, liberals and leftists find themselves in the middle of a backlash. Unable to declare any recent major victories, they thrash out against the most visible and easily targeted enemy, symbolized by the drunken Brown University fraternity birthday boy. In casebook fashion, the peculiarities of mildly dramatic incidents become blown up to form their own reality, while the more pernicious forms of racism in the streets and in institutional structures blithely pass by unchallenged.

The cynic's views, while not entirely accurate, should at least give the regulator some cause for alarm. Given all the difficulties facing an advocate of hate speech regulation, is the pain worth the gain? The recommendations discussed below, suggesting a more productive approach, offer an alternative to the free speech route.

IV. Recommendations

I have tried to argue in the strongest possible terms for the adoption of two seemingly incompatible positions: the informal condemnation of hate speech in its crude and sophisticated versions, and the inadequacy of a free speech approach to the problem of racism. As a way of reconciling these, consider the following proposal. The regulation of hate speech becomes less of an issue the more it is tied to a more far-reaching program that attacks the heart of racism and its kin. In fact, the more programs a university adopts to combat the substance of racism, the less it will need to even consider hate speech regulations. Antiracism, in effect, swamps free speech.

Universities as educational institutions quite naturally respond to racism with educational programs, requiring students to take courses in different American cultures.[57] Some universities use educational programs in place of hate speech regulations.[58] The University of Florida cites the

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57. "The University of Minnesota requires that all students take at lest two courses on different American cultures. Mt. Holyoke and Tufts University have a similar requirement. The University of California, Berkeley, Faculty Senate recently ruled that all undergraduates must take at least one course in American Cultures." Carnegie Found. for the Advancement of Teaching, Special Report: Campus Life In Search of Community 20, 32 (1990).

58. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*" 1990 Duke L.J. 484, 562-69.

following examples of nonlegal steps to foster good race relations and diversity: the annual affirmative action conference, the annual multicultural retreats, and special events to celebrate diversity.[59]

If educational programs make up the only concerted effort that a university takes to combat racism, then a consideration of hate speech regulations makes some sense if for no other reason than to raise the issue of racism within an applied context. However, neither hate speech regulations nor educational programs should occupy the centerpiece of a university's antiracism platform. The education programs reflect a university's commitment to foster diversity which, although related in some respects, is not the same thing as a commitment to fight racism.[60] The University of Florida has retreats and conferences to promote diversity. Yet, the University also had policies that harmed its racial minority employees by changing the working hours of a predominantly black work force among its janitorial staff without notice. Many articles have appeared in academic journals on hate speech; I have yet to see one that addresses the nonacademic hiring policies of universities.

Antiracism policies must take priority. To the extent that hate speech regulations and educational programs help to effectuate antiracism, they have a strong justification. As I have tried to indicate, because of the conceptual entanglements connected to hate speech regulations, the regulations probably do not aid the fight against racism. Moreover, when structures that reproduce and increase the disparity between the races remain unchallenged, hate speech regulations and educational programs will have little impact on racism.

Universities need to develop programs that undermine the structural supports for racism. They need to carefully examine their employment practices, investment decisions, faculty reward systems, and community service. By focusing on single incidents involving sole perpetrators, hate speech codes primarily address individual racist attitudes, and it remains unclear whether the codes effectively alter attitudes or seriously address victims' injuries. Moreover, while attacking individual attitudes, far more dangerous forms of organized group structures may flourish unabated. For example, in the name of neutrality a university may find itself forced to fund and otherwise support a white student union that preaches white supremacy so as not to neutralize its support of a black student union.

The following list of recommendations for universities summarizes this Section and projects the discussion into the next:

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59. Letter from Pamela J. Bernard, General Counsel, University of Florida (May 4, 1992). For another example of advocating a lame response to racism, see Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 187, 236-44 (1991).

60. *See supra* notes 14-15 and accompanying text.

> (1) Hate Speech. Abandon hate speech codes as diversionary except where they can be demonstrated to play a role in a larger coordinated plan to combat racism.
> (2) Hate Associations. Withdraw institutional support for organizations that promote racism. Support efforts to undermine racism, such as educational and research efforts developed in order to help disadvantaged groups. Redefine faculty service so as to reward efforts in these directions.
> (3). Hate Crimes. Amplify sanctions and punishments for those activities already categorized as offensives that contain hate elements.

The next Section takes up this last suggestion in the context of the recent United States Supreme Court case *R.A.V. v. City of St. Paul.*[61]

V. Hate Speech Versus Hate Crime

Several teenagers in St. Paul, Minnesota, entered the fenced backyard of a black family and burned a cross. Their conduct violated a 1990 ordinance, which read:

> Whoever places on a public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[62]

The Minnesota Supreme Court reversed a trial court finding that the ordinance, as impermissibly content-based, violated the First Amendment.[63] The Minnesota Supreme Court found the ordinance constitutional in that it reached only fighting words, which the Constitution does not protect.[64] The United States Supreme Court reversed,[65] finding the ordinance facially invalid under the First Amendment.[66] In delivering the opinion of the Court, Justice Scalia found the ordinance content-based in that it prohibited only certain types of speech.[67]

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61. 112 S. Ct. 2538 (1992).
62. *Id.* at 2541.
63. *Id.*
64. *In re* Welfare of R.V.A., 464 N.W.2d 507 (Minn. 1991).
65. *St. Paul*, 112 S. Ct. at 2550.
66. *Id.* at 2547.
67. *Id.* at 2548.

Undoubtedly, this case will engender a cottage industry of commentaries, all within the context of free speech. Given that it raises serious questions about the constitutionality of hate speech codes, the case supports the position adopted in this Article.[68] However, the case has a much more important lesson to teach. I think that the key to the situation (not necessarily to the case) lies outside the realm of speech. St. Paul made the same mistake that many universities have by addressing speech, first and foremost. As Justice Scalia noted in the first footnote to the case, the conduct might have violated Minnesota statutes that carry significant penalties, such as terroristic threats, arson, and criminal damage to property (to say nothing of a charge not challenged by the petitioner in the case, racially motivated assaults).[69] Adding extra punishment to something that already is an offense would prove a far better course than to create a new offense out of whole cloth, which exactly describes the hate speech code approach.[70]

The above approach, the nonspeech road, does not underestimate the harm induced by burning crosses in the yards of blacks. A strong case can be made that society should regard it as more injurious to burn a cross on the lawn of a black family than to burn a tree on the lawn of an environmentalist because blacks comprise a suspect class deserving greater constitutional protection than environmentalists. However, that does imply that one form of expressive activity should be proscribed and the other protected. Recognizing the differences in harm can best be captured in the context of meting out punishments for already existing offenses.[71]

VI. Conclusion

Hate speech can rile the emotions. Racism is on the rise. Hate speech cannot be condoned. Yet, universities need to take a long, hard look

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68. Surely, those codes that select out only certain kinds of fighting words for regulation are subject to challenge. *See* Scott Jaschik, *Campus 'Hate Speech' Codes in Doubt After High Court Rejects a City Ordinance*, Chron. of Higher Educ., July 1, 1992, at A19.

69. *St. Paul*, 112 S. Ct. at 2541, n.1.

70. For an example of making an existing crime, such as assault and battery, more serious if motivated by racial animosity, see Ill. Ann. Stat., ch. 38, para. 12-7.1(a), (b) (Smith-Hurd Supp. 1990) ("A person commits ethnic intimidation when, by reason of . . . race . . . he commits assault. . . . [A]ny person who commits ethnic intimidation as a participant in a mob action . . . which results in the violent infliction of injury . . . shall be guilty of a Class 3 felony.").

71. If the racially or other forbidden motive could only be proved based on the speech or expression of the accused person, then policies that prescribe harsher penalties for certain offenses when the motivation is racial, etc. would be subject to constitutional challenge. However, speech and expression would seldom be the only forms of proof in these cases. *Cf.* Robert M. O'Neil, *A Time to Re-Evaluate Campus Speech Codes*, Chron. of Higher Educ., July 8, 1992, at A40.

at the less visible forms of racism and to take the lead in adopting a truly antiracism agenda. The enactment of hate speech codes does have a symbolic impact. Unfortunately, it may have only a symbolic value.

Enacting and implementing hate speech codes has its price. Considerable time and energy are expended; new foes come to the forefront, and legal and constitutional entanglements abound. Under one scenario, hate speech codes may make it easier to propose later more sweeping antiracism policies.[72] However, another scenario seems more likely. The divisiveness caused by the debate over hate speech codes will make universities more reluctant to implement necessary structural changes. Hate speech proponents will have won a Pyrrhic victory, resulting in some exercising more care in their talk but leaving the structural features of racism largely intact.

Universities can no longer avoid making an explicit commitment to the fight against racism. Racism tears apart the very fabric of society, making universities less viable institutions. Affirmative action should not only concern itself with admissions and hiring policies. Rather it should serve as the center for the university to take affirmative steps to combat racism through some of the following means: reward faculty members whose teaching, research, and service address racism; make socially responsible investments that counter racism; put your own house in order; and avoid the hate speech trap.

Hate speech constitutes a form of racism, but its racist implications have limits. It is a racism connected to attitude and generally connected only in tangential ways to overt racist actions and deeply embedded racist structures.

Hate speech also harms, but the harms have more deep-seeded roots. Hate speech deeply wounds not because of the speech itself, but because of the background conditions that make the harm possible in the first place. Hate speech can divert attention away from the conditions of racism. The fight against racism cannot afford diversions.

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72. I owe this suggestion to Professor Andrew Altman, Department of Philosophy, George Washington University.

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